

83-751

No.

NOV 4 1983

---

**In the Supreme Court of the United States**

OCTOBER TERM, 1983

---

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
PETITIONERS

v.

JERRY T. O'BRIEN, INC., ET AL.

---

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT**

---

REX E. LEE

*Solicitor General*

LOUIS F. CLAIBORNE

*Deputy Solicitor General*

SAMUEL A. ALITO, JR.

*Assistant to the Solicitor General*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 633-2217*

DANIEL L. GOELZER

*General Counsel*

PAUL GONSON

*Solicitor*

LINDA D. FIENBERG

*Associate General Counsel*

HARRY J. WEISS

*Special Trial Counsel*

ELIZABETH A. SPURLOCK

*Attorney*

*Securities and Exchange Commission*

*Washington, D.C. 20549*

---

### **QUESTION PRESENTED**

Whether the Securities and Exchange Commission must notify "targets" of its non-public investigations when subpoenas are issued to third parties.



## **PARTIES TO THE PROCEEDING**

Petitioners (who were defendants and cross-defendants in the district court and appellees in the court of appeals) are the Securities and Exchange Commission and Jack H. Bookey, Lane B. Emory, and George N. Prince, employees of the Commission's Seattle Regional Office.

Respondents are Jerry T. O'Brien, Inc. d/b/a/ Pennaluna & Co.; Jerry T. O'Brien; Benjamin A. Harrison; and Pennaluna & Co., Inc. (all of whom were plaintiffs in the district court and appellants in the court of appeals) and Harry F. Magnuson and H.F. Magnuson & Co. (who were defendants and cross-plaintiffs in the district court and appellants in the court of appeals).

## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statutory provisions involved .....	1
Statement .....	2
Reasons for granting the petition .....	6
Conclusion .....	17
Addendum .....	18
Appendix A .....	1a
Appendix B .....	9a
Appendix C .....	17a
Appendix D .....	25a
Appendix E .....	26a
Appendix F .....	28a
Appendix G .....	31a

## TABLE OF AUTHORITIES

### Cases:

<i>Atlantic Richfield Co. v. FTC</i> , 546 F.2d 646 ..	14
<i>Berger v. New York</i> , 388 U.S. 41 .....	15
<i>Black v. Sheraton Corp. of America</i> , 564 F.2d 531 .....	14
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 .....	9
<i>Cole, In re</i> , 342 F.2d 5, cert. denied, 381 U.S. 950 .....	11, 12
<i>Couch v. United States</i> , 409 U.S. 322 .....	7
<i>Donaldson v. United States</i> , 400 U.S. 517 .	6, 11, 12
<i>Douglas Oil Co. v. Petrol Stops Northwest</i> , 441 U.S. 211 .....	13
<i>FBI v. Abramson</i> , 456 U.S. 615 .....	13
<i>FCC v. Schreiber</i> , 381 U.S. 279 .....	10
<i>FSLIC v. First National Development Corp.</i> , 497 F. Supp. 724 .....	14

# IV

Cases:—continued	Page
<i>FTC v. Standard Oil Co.</i> , 449 U.S. 232 .....	15
<i>Fisher v. United States</i> , 425 U.S. 319 .....	7
<i>Frankel v. SEC</i> , 460 F.2d 813, cert. denied, 409 U.S. 889 .....	14
<i>Fugazy Continental Corp. v. NLRB</i> , 514 F. Supp. 718 .....	14
<i>Groban, In re</i> , 352 U.S. 330 .....	9
<i>Hannah v. Larche</i> , 363 U.S. 420 .....	2, 7, 8, 9, 11, 12, 15, 16-17
<i>Howfield v. United States</i> , 409 F.2d 694 .....	11
<i>Illinois v. Abbott &amp; Associates, Inc.</i> , No. 81-1114 (Mar. 29, 1983) .....	13
<i>Kelley v. United States</i> , 536 F.2d 897, cert. denied, 429 U.S. 1047 .....	11
<i>Laird v. Tatum</i> , 408 U.S. 1 .....	7
<i>NLRB v. Robbins Tire &amp; Rubber Co.</i> , 437 U.S. 214 .....	13, 14
<i>PepsiCo, Inc. v. SEC</i> , 563 F. Supp. 828 .....	12, 14, 15, 16
<i>Reisman v. Caplin</i> , 375 U.S. 440 .....	14
<i>Scarafiotti v. Shea</i> , 456 F.2d 1052 .....	11
<i>SEC v. Certain Unknown Purchasers of the Common Stock of, and Call Options for, the Common Stock of Santa Fe Int'l Corp.</i> , No. 81 Civ. 6553 (WCC) (S.D.N.Y. Nov. 13, 1981) .....	16
<i>SEC v. Dresser Industries, Inc.</i> , 628 F.2d 1368, cert. denied, 449 U.S. 993 .....	10
<i>Sprecher v. Graber</i> , 716 F.2d 968 .....	14
<i>Steadman v. SEC</i> , 450 U.S. 91 .....	10
<i>United States v. Blue</i> , 384 U.S. 251 .....	11
<i>United States v. Calandra</i> , 414 U.S. 338 .....	9, 17
<i>United States v. Chemical Foundation, Inc.</i> , 272 U.S. 1 .....	9

Cases:—continued	Page
<i>United States v. Miller</i> , 425 U.S. 435 .....	5, 6, 12
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632 .....	7
<i>United States v. National City Lines, Inc.</i> , 334 U.S. 573 .....	15
<i>United States v. Payner</i> , 447 U.S. 727 .....	6, 11
<i>United States v. Powell</i> , 379 U.S. 48 .....	4-5, 7, 10, 11, 12
<i>United States v. Rylander</i> , No. 81-1120 (Apr. 19, 1983) .....	14
<i>United States v. Schutterle</i> , 586 F.2d 1201 ....	11
<i>United States v. Sells Engineering, Inc.</i> , No. 81-1032 (June 30, 1983) .....	13
<i>United States v. Washington</i> , 431 U.S. 181 ...	7
<i>United States v. Winner</i> , 641 F.2d 825 .....	14
<i>United States v. Zucker</i> , 161 U.S. 475 .....	7
<i>Vermont Yankee Nuclear Power Corp. v.</i> <i>NRDC</i> , 435 U.S. 519 .....	10
<i>Wedbush, Noble, Cooke, Inc. v. SEC</i> , No. CV-83-3961 CBM (KX) (C.D. Cal. July 11, 1983), stay denied, 714 F.2d 927) .....	6-7

Constitution, statutes, regulations and rule:

U.S. Const.:	
Amend. I .....	7
Amend. IV .....	6, 11
Amend. V .....	7
Due Process Clause .....	6
Amend. VI	
(Confrontation Clause) .....	7
Family Educational Rights and Privacy Act of 1974, 20 U.S.C. (& Supp. V) 1232g .....	9
Freedom of Information Act, 5 U.S.C. 552:	
5 U.S.C. 552(b)(7)(A) .....	14
5 U.S.C. 552(b)(7)(C) .....	13

# VI

Constitution, statutes, regulations and rule:—cont.	Page
Investment Advisers Act of 1940, 15 U.S.C. 80b-1 <i>et seq.</i> .....	2
Investment Company Act of 1940, 15 U.S.C. 80a-1 <i>et seq.</i> .....	2
Privacy Act, 5 U.S.C. 552a .....	4
Public Utility Holding Company Act, 15 U.S.C. 79 <i>et seq.</i> .....	1
Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 <i>et seq.</i> .....	4
12 U.S.C. 3401(1) .....	8
12 U.S.C. 3401(4) .....	8
12 U.S.C. 3401(5) .....	8
12 U.S.C. 3410(a) .....	8
12 U.S.C. 3410(b) .....	8
12 U.S.C. 3422 .....	8
Securities Act of 1933, 15 U.S.C. 77a <i>et seq.</i> ..	1
§ 5(a), 15 U.S.C. 77e(a) .....	3
§ 5(c), 15 U.S.C. 77e(c) .....	3
§ 17(a), 15 U.S.C. 77q(a) .....	3
§ 19(a), 15 U.S.C. 77s(a) .....	2, 9, 31a
§ 19(b), 15 U.S.C. 77s(b) .....	2, 31a
§ 20(b), 15 U.S.C. 77t(b) .....	3
§ 22(b), 15 U.S.C. 77v(b) .....	2, 31a
Securities Exchange Act of 1934, 15 U.S.C. 78a <i>et seq.</i> .....	1
§ 10(b), 15 U.S.C. 78j(b) .....	3
§ 13(a), 15 U.S.C. 78m(a) .....	3
§ 13(d), 15 U.S.C. 78m(d) .....	3
§ 13(g), 15 U.S.C. 78m(g) .....	3
§ 14(a), 15 U.S.C. 78n(a) .....	3
§ 15(b), 15 U.S.C. 78o(b) .....	3
§ 15(b)(1), 15 U.S.C. 78o(b)(1) .....	3
§ 16(a), 15 U.S.C. 78p(a) .....	3
§ 21(a), 15 U.S.C. 78u(a) .....	2, 31a-32a
§ 21(a)-(c), 15 U.S.C. 78u(a)-(c) .....	8
§ 21(b), 15 U.S.C. 78u(b) .....	2, 32a
§ 21(c), 15 U.S.C. 78u(c) .....	2, 32a

# VII

Constitution, statutes, regulations and rule—cont.	Page
§ 21(d), 15 U.S.C. 78u(d) .....	3
§ 21(h), 15 U.S.C. 78u(h) .....	8
§ 21(h)(2), 15 U.S.C. 78u(h)(2) .....	8
§ 23(a)(1), 15 U.S.C. 78w(a)(1) .....	2, 9, 32a
Trust Indenture Act of 1939, 15 U.S.C. 77aaa <i>et seq.</i> .....	1-2
26 U.S.C. (& Supp. V) 7609 .....	9
17 C.F.R. Pt. 201:	
Section 201.1 .....	3
Section 201.6 .....	2
Section 201.9 .....	3
17 C.F.R. 202.5 .....	2, 10
17 C.F.R. 203.5 .....	2
17 C.F.R. Pt. 240:	
Section 240.0-4 .....	2
Section 240.10b-5 .....	3
Section 240.13a-1 .....	3
Section 240.13d-1 .....	3
Section 240.13d-2 .....	3
Section 240.14a-3 .....	3
Section 240.14a-9 .....	3
Section 240.16a-1 .....	3
Fed. R. Crim. P. 6(e) .....	13
Miscellaneous:	
H.R. Rep. 96-1321, 96th Cong., 2d Sess., Pt. 1 (1980) .....	8, 9
3 L. Loss, <i>Securities Regulation</i> (2d ed. 1961) .	2
SEC 48th Annual Report 1982 .....	12

# **In the Supreme Court of the United States**

OCTOBER TERM, 1983

---

No.

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
PETITIONERS

v.

JERRY T. O'BRIEN, INC., ET AL.

---

## **PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

The Solicitor General, on behalf of the Securities and Exchange Commission and three of its employees, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### **OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 704 F.2d 1065. The opinions of the district court (App., *infra*, 9a-16a, 17a-24a) are not reported.

### **JURISDICTION**

The judgment of the court of appeals was entered on April 25, 1983. A timely petition for rehearing was denied on September 30, 1983 (App., *infra*, 25a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### **STATUTORY PROVISIONS INVOLVED**

The pertinent portions of the Securities Act of 1933 (Securities Act), 15 U.S.C. 77a *et seq.*, the Securities Exchange Act of 1934 (Securities Exchange Act), 15 U.S.C. 78a *et seq.*, the Public Utility Holding Company Act of 1935, 15 U.S.C. 79 *et seq.*, the Trust Indenture Act of 1939,

15 U.S.C. 77aaa *et seq.*, the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*, and the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*, are set forth in App., *infra*, 31a-438a.

## STATEMENT

This petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit compelling the Securities and Exchange Commission to furnish "targets" of its non-public, fact-gathering inquiries with notice of subpoenas issued to other witnesses.

1. Under its statutes, the Commission has express authority to conduct such investigations as it deems necessary and to issue subpoenas for testimony and documents.<sup>1</sup> The rules governing such inquiries provide that "[u]nless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public."<sup>2</sup> Commission investigations, to which there are no parties, are preliminary, non-adjudicatory inquiries<sup>3</sup> that are conducted to determine whether law enforcement proceedings should be commenced. After an investigation is completed, the Commission may institute an administrative adjudicatory proceeding,<sup>4</sup> file an injunctive action in a federal district court,

<sup>1</sup> See Section 19(b) of the Securities Act, 15 U.S.C. 77s(b), and Section 21(a) and (b) of the Securities Exchange Act, 15 U.S.C. 78u(a) and (b). The Commission delegates its investigatory subpoena power to its staff by entering formal orders of investigation. See generally 17 C.F.R. 202.5. Commission subpoenas are not self-executing; the subpoena recipient may refuse to comply and await a possible subpoena enforcement proceeding brought by the Commission in an appropriate federal district court. Section 22(b) of the Securities Act, 15 U.S.C. 77v(b); Section 21(c) of the Securities Exchange Act, 15 U.S.C. 78u(c).

<sup>2</sup> 17 C.F.R. 203.5. See 17 C.F.R. 240.0-4. Virtually all Commission investigations are non-public. See 3 L. Loss, *Securities Regulation* at 1955 (2d ed. 1961). The various Commission rules concerning investigations were promulgated under the Commission's statutory authority to make "such rules and regulations as may be necessary to carry out" its statutory mandates. Section 19(a) of the Securities Act, 15 U.S.C. 77s(a). See Section 23(a)(1) of the Securities Exchange Act, 15 U.S.C. 78w(a)(1).

<sup>3</sup> See *Hannah v. Larche*, 363 U.S. 420, 446-447 (1960).

<sup>4</sup> The Commission's rules governing its adjudicatory proceedings provide for notice, hearing, and cross-examination. 17 C.F.R. 201.6,



refer a matter to the Department of Justice for criminal prosecution, or take no action at all.<sup>5</sup>

2. Respondents brought this suit to halt an ongoing non-public investigation. On September 3, 1980, the Commission issued a formal order of investigation *In re H.F. Magnuson & Co.* The order described certain transactions, listed provisions of the securities laws that these transactions may have violated,<sup>6</sup> and empowered certain employees of the Commission's Seattle Regional Office to subpoena witnesses and evidence.

In September 1981, Jerry T. O'Brien, Inc., a registered broker-dealer,<sup>7</sup> and certain affiliated individuals, sued the Commission and certain employees of its Seattle Regional Office to prevent the scheduled testimony of Harry F. Magnuson and others and to enjoin the investigation on the ground, among others, that it had been initiated improperly.<sup>8</sup> Magnuson, a customer of O'Brien, filed a cross-claim

---

201.9. These rules do not apply to preliminary investigations. 17 C.F.R. 201.1.

<sup>5</sup> See, e.g., Section 20(b) of the Securities Act, 15 U.S.C. 77t(b); Sections 15(b) and 21(d) of the Securities Exchange Act, 15 U.S.C. 78o(b) and 78u(d).

<sup>6</sup> The Commission directed the staff to determine whether the events described in the order constituted the filing of false and misleading reports with the Commission, the failure to file required statements with the Commission, or the selling of stock in violation of antifraud provisions of the securities laws. The formal order stated that the following provisions of the federal securities laws may have been violated: Sections 5(a), (c) and 17(a) of the Securities Act, 15 U.S.C. 77e(a), (c) and 77q(a); Sections 10(b), 13(a), (d), (g), 14(a) and 16(a) of the Securities Exchange Act, 15 U.S.C. 78j(b), 78m(a), (d), (g), 78n(a) and 78p(a); and Commission Rules 10b-5, 13a-1, 13d-1, 13d-2, 14a-3, 14a-9 and 16a-1, 17 C.F.R. 240.10b-5, 240.13a-1, 240.13d-1, 240.13d-2, 240.14a-3, 240.14a-9 and 240.16a-1.

<sup>7</sup> See Section 15(b)(1) of the Securities Exchange Act, 15 U.S.C. 78o(b)(1).

<sup>8</sup> Respondents alleged that the formal order was improper because it did not include a finding that each person being investigated had likely committed a violation. They claimed that the Commission did not have a valid purpose for investigating them and should have given them notice of, and the opportunity to comment on, the commencement of the investigation. In addition, they alleged that the Commission was

and third-party complaint against the Commission raising similar challenges.

3. In January 1982, the district court dismissed respondents' claims for injunctive relief,<sup>9</sup> since respondents' challenges to the legality of the investigation could be litigated if and when the Commission brought an action to enforce its subpoenas (App., *infra*, 17a-24a).<sup>10</sup> Respondents then moved for an injunction pending appeal and, for the first time, sought notice of subpoenas issued to third parties. The district court issued a second order (App., *infra*, 9a-16a) declining to "fashion such a novel remedy" (*id.* at 12a).

4. On April 25, 1983, the court of appeals affirmed the dismissal of all claims for injunctive relief except respondents' request for notice. The court acknowledged (App., *infra*, 6a) that persons and firms under investigation generally "have no right to protect or withhold documents held by a third party." The court stated, however, that "targets"<sup>11</sup> of investigations "have a right to be investigated consistently with the standards" of *United States v.*

---

reinvestigating matters litigated and settled by the parties in 1975. One respondent alleged that the Commission staff's inspection of records on file at the Spokane Stock Exchange violated his constitutional and common law rights to privacy. Respondents also made claims under the Privacy Act, 5 U.S.C. 552a.

\* The court also determined that the Commission's investigation was lawful (App., *infra*, 19a). Respondents' claims for damages under the Privacy Act are still pending.

<sup>10</sup> At that time, no subpoena enforcement proceedings relating to this investigation had been initiated. Subsequently, the Commission filed subpoena enforcement actions against some of the respondents and others. *SEC v. Magnuson*, No. 82-1178-Z (D. Mass. Aug. 11, 1982) (enforcing three Commission subpoenas); and *SEC v. Magnuson*, No. C-82-282-RJM (E.D. Wash.) (under submission since July 1982). In addition, in *Magnuson v. SEC*, No. 82-2042 (D. Idaho July 27, 1982), the district court enforced, under the Right to Financial Privacy Act of 1978 (RFPA), 12 U.S.C. 3401 *et seq.*, the Commission's subpoena for certain bank records. In each of these actions, the lawfulness of this investigation was challenged, and, in the two decided cases, the challenges were rejected.

<sup>11</sup> The court of appeals made no attempt to define the term "target," which is not used by the Commission in its investigations. See page 16 & note 41, *infra*.

*Powell*, 379 U.S. 48 (1964) (App., *infra*, 6a), and are thus entitled to notice of third-party subpoenas so that they can assert this right "by seeking permissive intervention in enforcement proceedings brought by the agency against the third party or by other appropriate district court proceedings" (*id.* at 7a).<sup>12</sup>

5. The Commission filed a petition for rehearing with a suggestion for rehearing en banc, and the United States filed a brief amicus curiae in support of the petition on behalf of more than 20 other agencies whose practices were threatened by the panel decision (U.S. Am. Br. 2 n.1). The court of appeals denied (App., *infra*, 25a) rehearing en banc. Writing for the five dissenters, Judge Kennedy stated (*id.* at 26a) that the court had "decline[d] to review a panel decision that is novel, of vast importance, and, in my view, most erroneous. Our refusal to review panel decisions of this type imposes an unnecessary burden on the Supreme Court." He also noted (*id.* at 26a-27a):

There is no principled basis for confining the panel holding to the context of an SEC investigation. It threatens to compromise government investigations by most agencies. Not only will wrongdoers be provided a new instrument of obstruction or delay, but also employees and others subject to reprisals will be chilled from cooperating with investigators. Under the panel decision, government agencies will find it increasingly difficult to conduct confidential, nonpublic investigations in which actual targets are not discovered until a number of subpoenas have been served. Agencies may instead be forced to articulate premature conclusions about potential targets.

---

<sup>12</sup> The court rejected the Commission's argument that respondents could not seek notice because they lacked standing to challenge third-party subpoenas. See *United States v. Miller*, 425 U.S. 435, 444 (1976). The court held (App., *infra*, 7a) that *Miller* and other standing cases were irrelevant because they concerned the asserted right of targets "to maintain the confidentiality of information held by third parties" rather than "the right to be investigated consistently with the *Powell* standards."

## REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is not supported by any constitutional provision, statute, rule, or judicial decision; is inconsistent with the reasoning of decisions of this Court and numerous other courts of appeals; is contrary to a half-century of unbroken administrative practice; and threatens seriously to impede important investigations conducted by the Securities and Exchange Commission and more than 35 other agencies that have never previously been required to notify persons or firms under investigation when subpoenas are issued to third parties (see Addendum *infra*, 18-25).

1. The court of appeals' decision is based upon nothing but the court's own notion of sound public policy. The court did not purport to rest its novel decision on any provision of the Constitution, and it is clear that none applies. The Fourth Amendment does not impose such a notice requirement. In *Donaldson v. United States*, 400 U.S. 517, 522, 530 (1971), the Court made clear that an individual has no Fourth Amendment interest in the records of third parties and that one's status as a target of an investigation does not create a right to challenge third-party subpoenas. And in *United States v. Miller*, 425 U.S. 435, 443 (1976), the Court reaffirmed that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." In addition, the Court noted (*id.* at 443 n.5) that, because the target lacked a Fourth Amendment interest in information subpoenaed from third parties, the agency's failure to afford notice of the subpoena was "without legal consequences." See *United States v. Payner*, 447 U.S. 727, 732 (1980).

The court below did not rely on the Fifth Amendment's Due Process Clause.<sup>13</sup> Had it done so, its decision would

---

<sup>13</sup> By contrast, in *Wedbush, Noble, Cooke, Inc. v. SEC*, No. CV-83-3961 CBM (KX) (C.D. Cal. July 11, 1983) (order granting preliminary injunction), a district court in the Ninth Circuit relied on the decision below in holding that there is a "due process right to notice of third party subpoenas." The court preliminarily enjoined the Commis-

squarely conflict with *Hannah v. Larche*, 363 U.S. 420 (1960).<sup>14</sup> In *Hannah*, the Court held that, prior to the initiation of formal charges, due process does not afford persons under investigation by a governmental agency such as the SEC<sup>15</sup> the right to be notified of adverse evidence or the identity of accusers. The Court expressly analogized (*id.* at 449 & n.30) administrative investigations to grand jury proceedings, the targets of which have never been entitled to notice of the identity of witnesses.<sup>16</sup> Fifth Amendment procedural protections, the Court held (363 U.S. at 449-451), are not required in agency or grand jury investigations because such inquiries do not adjudicate any legal rights but, at most, may lead to subsequent proceedings at which all the claimed procedural protections would fully apply. Moreover, the Court noted (*id.* at 443-444) that requiring such "trial-like" procedures would "make a shambles of the investigation and stifle the agency in its gathering of facts."<sup>17</sup>

---

sion from issuing third-party subpoenas without notice to the targets. See App., *infra*, 28a-30a; 714 F.2d 927 (9th Cir. 1983).

<sup>14</sup> The Fifth Amendment privilege against compelled self-incrimination is also inapplicable because a subpoena issued to a third party does not compel the target to give testimony. *E.g.*, *Fisher v. United States*, 425 U.S. 391, 397 (1976); *Couch v. United States*, 409 U.S. 322 (1973). Cf. *United States v. Washington*, 431 U.S. 181, 189 (1977) (one's status as a target of a grand jury investigation "neither enlarges nor diminishes the [Fifth Amendment] protection against compelled self-incrimination," and thus prosecutors need not provide special notice to a target).

<sup>15</sup> The Court specifically cited the Securities and Exchange Commission as an example of an agency that properly draws a distinction between the procedural rights afforded in adjudicatory hearings and investigations (363 U.S. at 446-448).

<sup>16</sup> The Court has analogized agency investigations to grand jury inquiries in other contexts as well. See, *e.g.*, *United States v. Powell*, 379 U.S. at 57; *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950).

<sup>17</sup> Additionally, the Sixth Amendment's Confrontation Clause does not apply because criminal proceedings have not been initiated. *Hannah v. Larche*, 363 U.S. at 440 n.16, citing *United States v. Zucker*, 161 U.S. 475, 481 (1896). And respondents made no claim that any third-party subpoenas interfered with their First Amendment rights. See *Laird v. Tatum*, 408 U.S. 1, 10-11, 13 (1972) (targets have no

2. The court of appeals likewise cited no statute that compels the Commission to provide notice of third-party subpoenas, and none exists. The statutes that authorize the SEC to conduct investigations, subpoena witnesses and records, and seek judicial enforcement of its subpoenas (see, *e.g.*, 15 U.S.C. 78u(a)-(c)) contain no hint that such notice is required.<sup>18</sup> Indeed, Congress has specifically considered this issue as it applies to the Commission and, except in very limited circumstances not applicable here or in the case of most investigative subpoenas, has not required that investigatees be notified of third-party subpoenas.<sup>19</sup> The absence of any other notice requirement in statutes governing the Commission's subpoena powers creates the

---

First Amendment interest in, and hence no standing to challenge, the existence of an allegedly overbroad investigation).

<sup>18</sup> As noted in *Hannah v. Larche*, 363 U.S. at 427 n.9, such provisions reflect the way Congress customarily "confers the subpoena power on an investigative agency." No suggestion was made in *Hannah* that this sort of provision provides a statutory basis for requiring notice of third-party subpoenas (see *id.* at 430-433).

<sup>19</sup> Under the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401(1) and (5), the Commission and many other agencies must notify certain "customers" of specified "financial institutions" regarding subpoenas for their account records. 15 U.S.C. 78u(h). In enacting the RFPFA, Congress carefully limited the class of persons entitled to notice (12 U.S.C. 3401(4) and (5)) and limited the requirement to subpoenas for the records of certain financial institutions. Congress also established procedures expressly designed to prevent notice from serving as a "sword for delay and obstruction" of law enforcement investigations. H.R. Rep. 96-1321, 96th Cong., 2d Sess., Pt. 1, at 4 (1980). See 12 U.S.C. 3410(a) and (b).

When Congress made the RFPFA applicable to the Commission, it devoted special attention to the impact of even this limited notice requirement on the Commission's investigatory subpoenas. Because of problems that notice would create in the investigation of securities law violations, Congress specifically exempted the Commission from the RFPFA for a two-year period. 12 U.S.C. 3422. Prior to the expiration of that exemption, Congress enacted a special statutory provision authorizing the Commission to avoid the notice requirements of the RFPFA by making an *ex parte* application to a federal district court. Section 21(h)(2), of the Securities Exchange Act, 15 U.S.C. 78u(h)(2).



"presumption" that Congress did not intend to impose such a burden. *Hannah v. Larche*, 363 U.S. at 433.<sup>20</sup>

In exercising its express statutory authority to establish procedures governing its investigations,<sup>21</sup> the Commission has not provided for notice of third-party subpoenas.<sup>22</sup> These procedures, which are similar to those of most other investigating agencies,<sup>23</sup> reflect the Commission's judgment concerning how best to balance its investigative needs against the legitimate interests of individuals under investigation. There is no evidence—and the court of appeals did not find—that the Commission's procedures have been unfair or oppressive.<sup>24</sup> Nor is there any proof that the court's novel notice requirement would significantly promote any legitimate interests. Without any evidence or expertise in

---

<sup>20</sup> When Congress has considered notice desirable, it has enacted notice statutes. See 26 U.S.C. (& Supp. V) 7609 (notice procedures for third-party IRS subpoenas); cf. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. (& Supp. V) 1232g.

<sup>21</sup> Section 19(a) of the Securities Act, 15 U.S.C. 77s(a); Section 23(a)(1) of the Securities Exchange Act, 15 U.S.C. 78w(a)(1).

<sup>22</sup> See pages 2-3 & note 4, *supra*.

<sup>23</sup> *Hannah v. Larche*, 363 U.S. at 444. See page 12 & note 31, *infra*.

<sup>24</sup> As discussed above, during its deliberations concerning the Right to Financial Privacy Act of 1978, Congress specifically considered the implications of affording notice of Commission subpoenas to persons under investigation. See page 8 note 19, *supra*. Congress found that the Commission "had an excellent record with respect to the use of its subpoena authority." H.R. Rep. 96-1321, *supra*, at 4.

Moreover, the court below ignored the presumption of regularity that attaches to administrative action. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). The mere possibility of abuse of investigatory authority does not establish a constitutional defect. *In re Groban*, 352 U.S. 330, 334 (1957). Cf. *United States v. Calandra*, 414 U.S. 338, 351-352 (1974) (footnote omitted) (declining "to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury").

the field, the court simply imposed its own conception of sound administrative practice.<sup>25</sup>

3. The court of appeals believed (App., *infra*, 7a) that notice of subpoenas issued to witnesses was required in order to "afford targets an opportunity to question whether agency actions comply with" *United States v. Powell*, *supra*. *Powell*, however, does not in any way suggest that such notice is necessary and does not confer an abstract "right to be investigated" in a particular manner (App., *infra*, 7a).<sup>26</sup> Rather, *Powell* merely concerned the showing that the Internal Revenue Service must make in order to obtain judicial enforcement of a summons. The Court held (379 U.S. at 57-58) that the IRS must show "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within [its] possession, and that the administrative steps required by the [Internal Revenue] Code have been followed."<sup>27</sup>

Unlike *Powell*, this case is not a subpoena enforcement action, and it consequently raises no questions regarding the showing that the Commission must make before judicial process issues.<sup>28</sup> Instead, this case concerns the ability of

---

<sup>25</sup> As this Court has held, courts may not impose upon administrative agencies procedural burdens such as the Ninth Circuit's notice requirement unless a constitutional or statutory right is implicated. *FCC v. Schreiber*, 381 U.S. 279, 289 (1965). See *Steadman v. SEC*, 450 U.S. 91, 104 (1981); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978).

<sup>26</sup> Indeed, five members of the en banc panel of the court below stated, "[t]he rule set forth by the panel opinion goes beyond any reasonable interpretation of [*Powell*]." App., *infra*, 26a.

<sup>27</sup> The Commission's statutes afford it broader subpoena authority than that provided by the Internal Revenue Code. See *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1377 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980). Moreover, unlike the IRS agents in *Powell*, Commission attorneys may not issue subpoenas until the Commission's five presidentially-appointed members first determine that subpoena power should be authorized to investigate certain transactions (17 C.F.R. 202.5).

<sup>28</sup> For the same reason, the court of appeals' notice requirement cannot possibly be justified as an exercise of supervisory power over the district courts. The courts of appeals possess no such authority over in-



a putative target to obtain an injunction against administrative subpoenas issued in conformity with all statutory requirements.

Moreover, notice of the sort required by the court of appeals is generally not needed to effectuate *Powell* because persons under investigation may raise any alleged impropriety when the agency institutes a subpoena enforcement or other action against them. As this Court held in *Donaldson*, to the extent that a target has any "protectable interest, as, for example, by way of privilege, or to the extent [that] he may claim abuse of process, [he] may always assert that interest or that claim in due course at its proper place in any subsequent trial" (400 U.S. at 531, citing *United States v. Blue*, 384 U.S. 251 (1966)). Absent such agency action, the target has suffered no legal harm. See *Hannah v. Larche*, 363 U.S. at 442-443.

4. The decision of the court below conflicts with decisions of every other court of appeals that has considered whether notice of third-party agency subpoenas is required. See *United States v. Schutterle*, 586 F.2d 1201, 1204 (8th Cir. 1978) (taxpayer is not entitled to notice and hearing before enforcement of an IRS summons directed to third party); *Scarafiotti v. Shea*, 456 F.2d 1052, 1053 (10th Cir. 1972) (*Donaldson* does not require notice to the taxpayer of a third-party subpoena); *In re Cole*, 342 F.2d 5, 8 (2d Cir.), cert. denied, 381 U.S. 950 (1965) (IRS examinations of third parties need not be preceded by notice to the taxpayer under investigation) (cited with approval by this Court in *Donaldson*, 400 U.S. at 530).<sup>29</sup> Similarly, the District

---

dependent administrative agencies or the Executive Branch. Moreover, even with respect to judicial proceedings, the supervisory power does not "confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing" (*United States v. Payner*, 447 U.S. at 737).

<sup>29</sup> Prior decisions of the Ninth Circuit also conflict with the decision below. See App., *infra*, 26a; *Kelley v. United States*, 536 F.2d 897, 899 (1976), cert. denied, 429 U.S. 1047 (1977) (subject of investigation has no Fourth Amendment interest in third party's records and thus no right to notice of investigatory summons); *Howfield v. United States*, 409 F.2d 694 (1969) (targets of IRS investigation have no right to pre-

Court for the Southern District of New York, relying upon *Cole* and this Court's decisions in *Miller*, *Hannah*, *Donaldson* and *Powell*, refused to follow the decision below and held that the Commission is under no obligation to provide persons under investigation with notice of subpoenas issued to witnesses. *PepsiCo, Inc. v. SEC*, 563 F. Supp. 828, 831-832 (S.D.N.Y. 1983).

5. The decision of the court below has seriously disrupted the Commission's law enforcement investigations.<sup>30</sup> Indeed, as a result of that decision, the Commission has found it necessary to hold in abeyance many of its current investigations in the Ninth Circuit. Furthermore, the harmful effects of the decision below are not confined to the Commission. More than 100 federal law enforcement and other programs depend upon subpoenas that are issued without notice to targets and pursuant to statutes analogous to the SEC's. See Addendum, *infra*, 18-25, *Hannah v. Larche*, 363 U.S. at 427. Unless reversed, the decision below is almost certain to impair the operation of these programs, as well as the SEC's efforts to discharge its statutory mandate.<sup>31</sup>

Notice concerning the identity of witnesses will delineate the focus and progress of an investigation, thereby substan-

---

vent government's acquisition of information from third-party witnesses).

<sup>30</sup> The Commission conducts as many as 1,200 formal investigations a year (see *SEC 48th Annual Report 1982*, at 118) and issues thousands of subpoenas in aid of those investigations. For example, during the first quarter of 1983, the Commission issued over 1,400 subpoenas for testimony and documents in the course of 116 non-public, fact-finding investigations in which 305 persons were named in the formal orders of investigation. Even if the Commission were required to give notice only to those persons named in the formal orders, the Commission would have issued over 3,750 notices in the first quarter of 1983 alone, or more than 15,000 on an annual basis. This is but a fraction of the number of notices that would be required by the decision below since formal orders are not intended to identify all persons whose activities may become subject to inquiry. Therefore, under the decision, the Commission may be required to give notice to many persons not named in formal orders.

<sup>31</sup> "There is no principled basis for confining the panel holding to the context of an SEC investigation. It threatens to compromise government investigations by most agencies." Dissent to denial of petition for rehearing en banc. App., *infra*, 28a.

tially increasing opportunities for the destruction of documents, intimidation of witnesses, tailoring of testimony, fabrication of defenses, and the transfer or dissipation of assets. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239 (1978); *United States v. Eisenberg*, 711 F.2d 959, 961 (11th Cir. 1983). In some cases, targets may threaten witnesses with physical or economic retaliation in an effort to mold their testimony or to persuade them not to testify. *Ibid.*; cf. *United States v. Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 6. Third-party witnesses, who are often employees or business associates of those under investigation, are particularly vulnerable to such coercion. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 239; see App., *infra*, 26a. Furthermore, confidential informants, whose cooperation with the government may not be known to the target, will be reluctant to come forward and testify, fearing that disclosure of their participation will expose them to retribution.<sup>32</sup> The threat of such obstruction underlies the longstanding provision for secrecy of grand jury proceedings,<sup>33</sup> to which this Court has analogized agency investigations such as those conducted by the Commission.<sup>34</sup>

<sup>32</sup> Notice also would needlessly expose innocent witnesses and subjects to prejudicial publicity, since their identities may no longer be confidential. A witness's participation in an investigation could lead to unfair speculation that he is accused of wrongdoing. Such publicity is particularly harmful when the Commission determines not to bring an enforcement case or not to name certain subjects in the instituted action. Cf. *United States v. Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 5 (footnote omitted) ("by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule"), quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979); *Illinois v. Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983), slip op. 5 n.8 (grand jury secrecy rule also protects third parties). Congress has recognized these privacy interests in the Freedom of Information Act. See 5 U.S.C. 552(b)(7)(C); *FBI v. Abramson*, 456 U.S. 615 (1982).

<sup>33</sup> See Rule 6(e), Fed. R. Crim. P.; *United States v. Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 6.

<sup>34</sup> See generally cases cited, page 7 & note 16, *supra*. Congress also protected agency inquiries from such potential abuses when, in en-

Notice also will enable targets to delay investigations and subsequent law enforcement proceedings. Targets will encourage witnesses not to comply with legitimate subpoenas, thereby forcing the agency to seek judicial enforcement in many instances where it would not otherwise be necessary.<sup>35</sup> And, under the rationale of the court of appeals, targets may intervene in numerous subpoena enforcement proceedings largely for the purpose of delay.<sup>36</sup> Even if a witness desires to comply voluntarily with a subpoena, targets armed with advance notice can be expected to file frivolous independent actions to delay compliance.<sup>37</sup> As a re-

---

acting the Freedom of Information Act, it created an exemption for information in active law enforcement investigative files. See 5 U.S.C. 552(b)(7)(A); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). Courts also have recognized an "investigatory files privilege," which protects information in active law enforcement files if its disclosure would compromise the investigation. See, e.g., *United States v. Winner*, 641 F.2d 825, 831 (10th Cir. 1981); *Black v. Sheraton Corp. of America*, 564 F.2d 531, 546 (D.C. Cir. 1977); *Frankel v. SEC*, 460 F.2d 813, 817-818 (2d Cir.), cert. denied, 409 U.S. 889 (1972).

<sup>35</sup> As the court observed in *PepsiCo, Inc. v. SEC*, 563 F. Supp. at 832, "[o]ne could readily envision investigations in which several targets raise separate objections to each subpoena an agency serves." See, e.g., *United States v. Rylander*, No. 81-1120 (Apr. 19, 1983), slip op. 9-10 (procedural impediments resulted in a two-year delay before a recipient of an IRS summons was found in contempt for noncompliance).

<sup>36</sup> See, e.g., *Reisman v. Caplin*, 375 U.S. 440 (1964) (action to enjoin third-party production); *Fugazy Continental Corp. v. NLRB*, 514 F. Supp. 718, 720-722 (E.D.N.Y. 1981) (court denied motion by subject of NLRB proceeding to intervene in subpoena enforcement action against third parties because subject had no interest in the subpoenaed material); *FSLIC v. First National Development Corp.*, 497 F. Supp. 724, 729, 732 (S.D. Tex. 1980) (court found that motions to intervene in subpoena enforcement action were "primarily motivated by [movants'] desire to impede the FSLIC investigation" and denied motions since movants did not have a protected interest in the subpoenaed books and records).

<sup>37</sup> See *Sprecher v. Graber*, 716 F.2d 968, 971 (2d Cir. 1983) (opposition to subpoena was "frivolous and interposed solely for delay"); *Atlantic Richfield Co. v. FTC*, 546 F.2d 646, 647 (5th Cir. 1977) (affirming dismissal of action by target against FTC and third-party witnesses "to enjoin the FTC from enforcing the subpoenas and the [third-party witnesses] from voluntarily complying with them").

sult, the Commission and other law enforcement agencies "would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable" (*Hannah v. Larche*, 363 U.S. at 443).<sup>38</sup> As a district court stated in declining to follow the holding of the court of appeals below, a notice requirement would permit targets

effectively to monitor the course and conduct of agency investigations. Experience and common sense should establish that such a power would be greatly abused, and that the limited resources presently available in our agencies to enforce the nation's public policies would be significantly reduced because of procedural maneuvering and other even less wholesome tactics.

*PepsiCo, Inc. v. SEC*, 563 F. Supp. at 832.

The requirement that persons under inquiry receive notice of subpoenas issued to witnesses also would inject substantial uncertainty into law enforcement and jeopardize pending investigations.<sup>39</sup> While requiring the provision of notice to "targets" when third-party subpoenas are served, the court of appeals made no effort to resolve such fundamental questions as the definition of a "target," the procedures for adjudicating whether a person or firm is a target, the rights of targets following receipt of notice, and the effect of noncompliance with the notice requirement.<sup>40</sup> See

<sup>38</sup> As this Court stated in *FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980), permitting premature judicial review of agency proceedings would result in "turning prosecutor into defendant" and would cause "interference with the proper functioning of the agency and a burden for the courts."

<sup>39</sup> Cf. *Berger v. New York*, 388 U.S. 41, 119 (1967) (Appendix to opinion of White, J., dissenting) (noting that confusion arising from judicial decisions and legislation concerning electronic eavesdropping inhibits law enforcement); *United States v. National City Lines, Inc.*, 334 U.S. 573, 591-592 (1948) (footnote omitted) (the uncertainty concerning the outcome of a district court's unprecedented holding "might go far toward defeating the [Clayton] Act's effective application to the most serious and widespread offenses and offenders").

<sup>40</sup> For example, since the entry of the decisions below, persons whose conduct the Commission is investigating have requested additional "rights" consequent to notice, including the right to be present at the testimony of third-party witnesses, to have access to and copies

*PepsiCo, Inc. v. SEC*, 563 F. Supp. at 832. Even the threshold question—what is a “target”?—is far from clear. The Commission itself does not use that term, and its inquiries generally focus on transactions rather than suspects.<sup>41</sup> Is a target any person or firm about whose activities evidence is gathered? Is it anyone suspected by the Commission staff? Is it anyone against whom sufficient evidence has been received to permit the initiation of administrative proceedings? Or the filing of an injunctive action? Or referral of the case for criminal prosecution?

And how are the courts to proceed when a party who has not received notice but claims to be a target seeks intervention in enforcement proceedings or initiates one of the “other appropriate district court proceedings” to which the court of appeals referred (App., *infra*, 7a)? Must the Commission disclose the evidence it has gathered and the investigative decisions it has made so that the correctness of its failure to provide target notice can be reviewed? While these and other issues are being resolved on a case-by-case basis, numerous Commission and other law enforcement investigations may be at risk.

For almost 50 years, the Securities and Exchange Commission has issued subpoenas without providing notice to the subjects of the investigation, and other investigative bodies have followed a similar practice since the beginning of the Republic. Such subpoenas have been routinely enforced by the federal courts. See *Hannah v. Larche*, 363

---

of testimony and documents obtained by subpoena, and to suppress evidence obtained by the Commission without advance notice to them.

<sup>41</sup> For example, the Commission may investigate unusual trading preceding the announcement of a tender offer for the purpose of determining whether someone traded with advance knowledge of the tender offer in violation of antifraud provisions of the securities laws. In such a case, the thousands of traders who purchased stock of the target company in the days prior to the announcement may be potential subjects. And, in some such cases, the Commission is required to file an enforcement action before identifying all culpable persons. See, e.g., *SEC v. Certain Unknown Purchasers of the Common Stock of, and Call Options for, the Common Stock of Santa Fe Int'l Corp.*, No. 81 Civ. 6553 (WCC) (S.D.N.Y. Nov. 13, 1981) (freezing assets in bank accounts).



U.S. at 442-444. If permitted to stand, the court of appeals' notice requirement, which reverses this historical practice without any demonstrated need, will cause grave difficulties for law enforcement that far outweigh any resulting benefits. *Ibid.*; see *United States v. Calandra*, 414 U.S. 338, 350-352 (1974).

### CONCLUSION

The petition for a writ of certiorari should be granted and the judgment should be reversed.

Respectfully submitted.

REX E. LEE

*Solicitor General*

LOUIS F. CLAIBORNE

*Deputy Solicitor General*

SAMUEL A. ALITO, JR.

*Assistant to the Solicitor General*

DANIEL L. GOELZER

*General Counsel*

PAUL GONSON

*Solicitor*

LINDA D. FIENBERG

*Associate General Counsel*

HARRY J. WEISS

*Special Trial Counsel*

ELIZABETH A. SPURLOCK

*Attorney*

NOVEMBER 1983

**ADDENDUM**

Federal departments and agencies authorized to issue subpoenas or summonses without providing notice to "targets" include:

***DEPARTMENT OF AGRICULTURE***

Inspector General Act

—5 U.S.C. App. I, 6(a)(4)

United States Grain Standards Act

—7 U.S.C. 87f(a)

Packers and Stockyards Act

—7 U.S.C. 222

Poultry Products Inspection Act

—21 U.S.C. 467d

Perishable Agricultural Commodities Act

—7 U.S.C. 499m(c)

Tobacco Inspection Act

—7 U.S.C. 511n

Agriculture Adjustment Act of 1933

—7 U.S.C. 610(h)

Meat Inspection Act

—21 U.S.C. 677

Egg Products Inspection Act

—21 U.S.C. 1051

Agricultural Act of 1949, as amended 1980

—7 U.S.C. 1446(d)(5)

Federal Seed Act

—7 U.S.C. 1603(a)

Cotton Research and Promotion Act

—7 U.S.C. 2115

Animal Welfare Act

—7 U.S.C. 2146(c)

Potato Research and Promotion Act

—7 U.S.C. 2622

Egg Research and Consumer Information Act

—7 U.S.C. 2717

Beef Research and Information Act

—7 U.S.C. 2917



Wheat and Wheat Foods Research and Nutrition Education Act

—7 U.S.C. 3412

Swine Health Protection Act

—7 U.S.C. 3807(c)

Floral Research and Consumer Information Act

—7 U.S.C. 4317

Horse Protection Act

—15 U.S.C. 1825(d)

#### ***CIVIL AERONAUTICS BOARD***

Federal Aviation Act of 1958

—49 U.S.C. 1484

#### ***DEPARTMENT OF COMMERCE***

Inspector General Act

—5 U.S.C. App. 1, 6(a)(4)

China Trade Act, 1922

—15 U.S.C. 155

Weather Modification Reporting Act of 1972

—15 U.S.C. 330c(a)

Northern Pacific Halibut Act of 1982

—16 U.S.C. 773i(f)

Offshore Shrimp Fisheries Act of 1973

—16 U.S.C. 1100b-5(d)

Export Administration Act (anti-boycott and export control)

—50 U.S.C. App. 2411

#### ***COMMISSION ON CIVIL RIGHTS***

Civil Rights Act of 1957

—42 U.S.C. 1975d(f) and (g)

#### ***COMMODITY FUTURES TRADING COMMISSION***

Commodity Exchange Act

—7 U.S.C. 15

#### ***CONSUMER PRODUCT SAFETY COMMISSION***

Consumer Product Safety Act

—15 U.S.C. 2076(b)(3)

Federal Hazardous Substances Act

—15 U.S.C. 1270

Flammable Fabrics Act

—15 U.S.C. 1193(c), 1194

**DEPARTMENT OF DEFENSE**

DOD Inspector General

—Pub. L. No. 97.252 (September 1982)

**DEPARTMENT OF EDUCATION**

Inspector General Act

—5 U.S.C. App. I, 6(a)(4)

**DEPARTMENT OF ENERGY**

Emergency Petroleum Allocation Act

—15 U.S.C. 754(a)(1)

Federal Energy Administration Act

—15 U.S.C. 772(e)(1)

DOE Inspector General

—42 U.S.C. 7138(g)

DOE Reorganization Act

—42 U.S.C. 7255

**FEDERAL ENERGY REGULATORY COMMISSION**

Interstate Commerce Act

—49 U.S.C. 12

Natural Gas Act

—15 U.S.C. 717m(c)

Federal Power Act

—16 U.S.C. 825(f)(b)

Natural Gas Policy Act of 1978

—15 U.S.C. 3418

**ENVIRONMENTAL PROTECTION AGENCY**

Federal Insecticide, Fungicide, and Rodenticide Act

—7 U.S.C. 136d(d)

Toxic Substances Control Act

—15 U.S.C. 2610(c)

Federal Water Pollution Control Act Amendments of 1972

—33 U.S.C. 1369(a)

Noise Control Act of 1972

—42 U.S.C. 4915(d)

Clean Air Act Amendments of 1977

—42 U.S.C. 7545(c), 7607(a), 7621(c)

**EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION**

Title VII of the 1964 Civil Rights Act As Amended  
—42 U.S.C. 2000e-9 (incorporating 29 U.S.C.  
161(1))

Fair Labor Standards Act  
—29 U.S.C. 209

**FEDERAL COMMUNICATIONS COMMISSION**

Communications Act  
—47 U.S.C. 409(e), (f), and (g)

**FEDERAL DEPOSIT INSURANCE CORPORATION**

Financial Institutions Supervisor Act  
—12 U.S.C. 1818(n)  
—12 U.S.C. 1820(c)

**FEDERAL ELECTION COMMISSION**

Federal Election Campaign Act  
—2 U.S.C. 437d(a)

**FEDERAL HOME LOAN BANK BOARD**

National Housing Act  
—12 U.S.C. 1730(m)

**FEDERAL LABOR RELATIONS AUTHORITY**

Civil Service Reform Act of 1978  
—5 U.S.C. 7132  
Foreign Service Act of 1980  
—22 U.S.C. 4107

**FEDERAL MARITIME COMMISSION**

Shipping Act  
—46 U.S.C. 826(a)

**FEDERAL TRADE COMMISSION**

Federal Trade Commission Act  
—15 U.S.C. 49  
Federal Trade Commission Improvement Act  
—15 U.S.C. 57b-1 (civil investigative demand)  
Energy Policy and Conservation Act  
—42 U.S.C. 6299(a)

**FEDERAL RESERVE BOARD**

Financial Institutions Supervisory Act  
—12 U.S.C. 1818(n) and 1820(c)  
Bank Holding Company Act  
—12 U.S.C. 1844(F)

## **GENERAL ACCOUNTING OFFICE—COMPTROLLER GENERAL**

Federal Energy Administration Act of 1974

—15 U.S.C. 771(b), (d) and (e)

Energy Policy and Conservation Act

—42 U.S.C. 6382(a), 6384(c)

Medicare-Medicaid Anti-Fraud And Abuse Amend-  
ments of 1977

—42 U.S.C. 1320a-4(a) and (b)

## **GENERAL SERVICES ADMINISTRATION**

Inspector General Act

—5 U.S.C. App. I, 6(a)(4)

## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

Social Security Act

—42 U.S.C. 405(d) and (c)

HHS Inspector General

—42 U.S.C. 3525(a)

## **DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

Inspector General Act

—5 U.S.C. App. I, 6(a)(4)

Interstate Land Sales Full Disclosure Act

—15 U.S.C. 1714(c)

Fair Housing Act

—42 U.S.C. 3611(a)

National Manufactured Housing Construction and  
Safety Standards Act of 1974

—42 U.S.C. 5413(c) and (d)

## **DEPARTMENT OF INTERIOR**

DOI Inspector General

—Pub. L. No. 97-357

Federal Oil and Gas Royalty Management Act of 1982

—30 U.S.C. 1717(a)

## **DEPARTMENT OF JUSTICE**

Controlled Substances Act

—21 U.S.C. 876

Immigration and Nationality Act

—8 U.S.C. 1225(a)

Antitrust Civil Process Act

—15 U.S.C. 1312 (civil investigative demand)

Racketeer Influenced and Corrupt Organizations Act  
(RICO)

—18 U.S.C. 1968 (civil investigative demand)

#### **DEPARTMENT OF LABOR**

Inspector General Act

—5 U.S.C. App. I, 6(a)(4)

Fair Labor Standards Act

—29 U.S.C. 209

Labor-Management Reporting and Disclosure Act

—29 U.S.C. 521(b)

Employee Retirement Income Security Act

—29 U.S.C. 1134(c)

#### **MERIT SYSTEMS PROTECTION BOARD** (*Special Counsel*)

Civil Service Reform Act of 1978

—5 U.S.C. 1205(b)(2)(A)

#### **NATIONAL CREDIT UNION ADMINISTRATION**

Federal Credit Union Act

—12 U.S.C. 1784

#### **NATIONAL LABOR RELATIONS BOARD**

Labor-Management Relations Act

—29 U.S.C. 161(1)

#### **NATIONAL TRANSPORTATION SAFETY BOARD**

Transportation Safety Act of 1974

—49 U.S.C. 1903(b)

Federal Aviation Act

—49 U.S.C. 1004, 1484(b)

#### **NUCLEAR REGULATORY COMMISSION**

Atomic Energy Act

—42 U.S.C. 2201c

#### **PENSION BENEFIT GUARANTY CORPORATION**

Employee Retirement Income Security Act of 1974

—29 U.S.C. 1303(b)

#### **SECURITIES AND EXCHANGE COMMISSION**

Securities Act of 1933

—15 U.S.C. 77s(b)

Securities Exchange Act of 1934

—15 U.S.C. 78u(b)

Public Utility Holding Company Act

—15 U.S.C. 79r(c)

Trust Indenture Act of 1939

—15 U.S.C. 77uuu(a)

Investment Company Act of 1940

—15 U.S.C. 80a-40(b)

Investment Advisers Act of 1940

—15 U.S.C. 80b-9(b)

### ***SMALL BUSINESS ADMINISTRATION***

Small Business Act

—15 U.S.C. 634(b)(11)

Small Business Investment Act of 1958

—15 U.S.C. 687b(a)

### ***SYNTHETIC FUELS CORPORATION***

SFC Inspector General

—42 U.S.C. 8718(e)

### ***DEPARTMENT OF STATE***

State Inspector General

—22 U.S.C. 3929(a)

### ***DEPARTMENT OF TRANSPORTATION***

National Traffic and Motor Vehicle Safety Act of 1966

—15 U.S.C. 1401(c)

Motor Vehicle Information and Cost Savings Act  
Amendment of 1976

—15 U.S.C. 1914(a)

—15 U.S.C. 1990d(c)

—15 U.S.C. 2005(b)

Act to Prevent Pollution From Ships

—33 U.S.C. 1907(b)

Railroad Safety Appliance Acts

—45 U.S.C. 35, 40

Federal Railroad Safety Act of 1970

—45 U.S.C. 437(a)

Motor and Rail Carrier Safety Acts

—49 U.S.C. 502(d), (e)

Merchant Marine Act

—46 U.S.C. 1124(a)

Port and Tanker Safety Act

—33 U.S.C. 1227

Outer Continental Shelf Lands Act Amendments of 1978

—43 U.S.C. 1348(f)

Federal Aviation Act of 1958

—49 U.S.C. 1354(c)

—49 U.S.C. 1484

Natural Gas Pipeline Safety Act of 1968, as amended

—49 U.S.C. 1681(a)

Hazardous Materials Transportation Act

—49 U.S.C. 1808(a)

Hazardous Liquid Pipeline Safety Act

—49 U.S.C. 2010(a)

Investigation of Marine Casualties

—46 U.S.C. 239(e), recodified in 46 U.S.C. 7705  
(Pub. L. No. 98-89, 97 Stat. 500)

#### *DEPARTMENT OF THE TREASURY*

Financial Institutions Supervisory Act (Comptroller of the Currency)

—12 U.S.C. 1818(n)

—12 U.S.C. 1820(c)

Tariff Act of 1930

—19 U.S.C. 1509

Narcotics Drug Import and Export Acts

—21 U.S.C. 967

Internal Revenue Code

—26 U.S.C. 5274

—26 U.S.C. 7602

Federal Alcohol Administration Act

—27 U.S.C. 202(c)

Trading with the Enemy Act

—50 U.S.C. App. 5(b)

APPENDIX A

UNITED STATES COURT OF APPEALS  
NINTH CIRCUIT

Nos. 82-3108, 82-3109 and 82-3185

JERRY T. O'BRIEN, INC., DOING BUSINESS AS  
PENNALUNA & CO., ET AL., PLAINTIFFS-APPELLANTS.

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
DEFENDANTS-APPELLEES,

and

HARRY F. MAGNUSON AND H.F. MAGNUSON & COMPANY,  
CROSS-PLAINTIFFS-APPELLANTS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
CROSS-DEFENDANTS-APPELLEES.

Filed Apr. 25, 1983

Appeal from the United States District Court  
for the Eastern District of Washington

Before SKOPIL, PREGERSON, and FERGUSON, Circuit  
Judges.

PREGERSON, Circuit Judge:

I

The Securities and Exchange Commission (SEC) moved the district court to dismiss appellants' claims for injunctive relief. The court granted the motion after concluding that agency-initiated subpoena enforcement proceedings afforded appellants an adequate legal remedy. This appeal followed. Appellate jurisdiction is based on 28 U.S.C. § 1292(a)(1).

Since this appeal presents only questions of law, our review is *de novo*. *State of Oregon, Division of State Lands v.*



*Riverfront Protection Association*, 672 F.2d 792, 794 (9th Cir. 1982).

The relevant factual background may be summarized briefly. In September 1980, the SEC issued a Formal Order of Investigation (FOI) "In the Matter of H.F. Magnuson & Co."<sup>1</sup> The FOI stated that "Magnuson, Pennaluna & Co., Inc., Benjamin A. Harrison, corporations headquartered at H.F. Magnuson & Co., and *others*" (emphasis added) were suspected of engaging in securities violations. Neither Jerry T. O'Brien nor Jerry T. O'Brien, Inc., doing business as Pennaluna & Co., was named in the FOI. Subsequently, however, the SEC informed O'Brien's attorney that Jerry T. O'Brien, Inc., was "under consideration as being one of the 'others' engaged" in the suspected violations.

The FOI authorized SEC personnel to investigate the parties targeted by the FOI for a variety of securities laws violations including insider trading; failing to file certain required statements with the SEC; filing false or misleading annual reports, proxy statements, or ownership statements; and engaging in stock sales in violation of the anti-fraud provisions of the Securities Act of 1933.<sup>2</sup> The FOI also empowered certain SEC personnel to subpoena witnesses, documents, and other information. The SEC served

---

<sup>1</sup> This order was issued pursuant to the Securities Act of 1933, 15 U.S.C. § 77s(b), and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78u(a); 78u(b). Before an FOI is issued, SEC personnel conduct preliminary or informal investigations during which "no process is issued [nor] testimony compelled." 17 C.F.R. § 202.5. Thereafter, the Commission "may, in its discretion, make such formal investigations and authorize the use of process as it deems necessary." *Id.* An FOI launches the formal investigation, defines its scope, and establishes limits within which investigative staff may resort to process. *See SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1023 (D.C. Cir. 1978).

<sup>2</sup> Including possible violations of the Securities Act of 1933 sections 5(a), 15 U.S.C. § 77e(a); 5(c), 15 U.S.C. § 77e(c); 17(a), 15 U.S.C. § 77q(a); and the Securities and Exchange Act of 1934 sections 10(b), 15 U.S.C. § 78j(b); 13(a), 15 U.S.C. § 78m(a), 13(d), 15 U.S.C. § 78m(d); 13(g), 15 U.S.C. § 78m(g); 14(a), 15 U.S.C. § 78n(a); 16(a), 15 U.S.C. § 78p(a); and rules promulgated thereunder. 17 C.F.R. §§ 240.10b-5; 240.13a-1; 240.13d-1; 240.13d-2; 204.14a-3; 204.14a-9; 240.16a-1.

subpoenas on Jerry T. O'Brien, Inc., and on several individuals and entities not targeted by the investigation.<sup>3</sup>

Appellants sought to enjoin the investigation because they thought it was conducted improperly. In granting the SEC's motion, the district court concluded that appellants were not entitled to injunctive relief because they had an adequate remedy at law—the issues they raised could be litigated in subpoena enforcement proceedings initiated by the SEC under 15 U.S.C. § 78u(c).

## II

Appellants' challenges to the SEC's investigation fall into two categories: those that involve SEC actions aimed directly at appellants, and those that involve SEC subpoenas served on non-parties to the investigation.

### A. SEC actions directed at appellants

The district court correctly concluded that appellants had an adequate legal remedy in which to resist the SEC subpoenas served on them. This remedy was adequate because an SEC subpoena is not self-executing. A recipient of an SEC subpoena may refrain from complying with it, without penalty, until directed otherwise by a court order. See *Donaldson v. United States*, 400 U.S. 517, 523-25, 91 S.Ct. 534, 538-39, 27 L.Ed.2d 580 (1971).<sup>4</sup> A court will not en-

<sup>3</sup> Any relief accorded Jerry T. O'Brien, Inc., would accrue to Jerry T. O'Brien as an individual, and for all practical purposes any claims asserted by him as an individual are moot.

<sup>4</sup> The possibility of excesses in the conduct of agency investigations may explain why agency subpoenas are not self-executing but require judicial enforcement when a recipient of a subpoena does not voluntarily comply. See, e.g., *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 219, 66 S.Ct. 494, 510, 90 L.Ed. 614 (Murphy, J., dissenting) ("To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of [the subpoena] power. . . . Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty."). See also *id.* at 206 n.37, 66 S.Ct. at 504 n. 37; *United States v. DeGrosa*, 405 F.2d 926, 929 (3d Cir. 1969) (Constitution requires opportunity for judicial review prior to penalties for non-compliance with administrative subpoenas).

force an SEC subpoena directed at the target of an investigation unless the agency, at an evidentiary hearing, demonstrates that it has complied with the requirements of *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). These are that (1) the agency has a legitimate purpose for the investigation; (2) the inquiry is relevant to that purpose; (3) the agency does not possess the information sought; and (4) the agency has adhered to administrative steps required by law. *Id.* at 57-58, 85 S.Ct. at 254-55;<sup>5</sup> *Lynn v. Biderman*, 536 F.2d 820, 824 (9th Cir.), *cert. denied sub nom. Biderman v. Hills*, 429 U.S. 920, 97 S.Ct. 316, 50 L.Ed.2d 287 (1976). Thus, appellants have an adequate legal remedy with regard to subpoenas served on them.<sup>6</sup>

B. *The target's right to challenge SEC subpoenas served on non-parties*

Ordinarily, "parties summoned [by an administrative subpoena] and those affected by a disclosure may appear or intervene before the District Court and challenge the summons." *Reisman v. Caplan*, 375 U.S. 440, 445, 84 S.Ct. 508, 511, 11 L.Ed.2d 459 (1963). The SEC noted correctly in oral argument that the Supreme Court has since limited this precept. Such intervention "is permissive only and is not mandatory. The language recognizes that the District Court . . . may allow the [target of the investigation] to intervene." *Donaldson v. United States*, 400 U.S. at 529-30, 91 S.Ct. at 541-42 (emphasis added). Thus, when "an ad-

---

<sup>5</sup> Although *Powell* involved the Internal Revenue Service, the *Powell* standards have been extended to SEC investigations, as well as those of other administrative agencies. *E.g.*, *Lynn v. Biderman*, 536 F.2d 820, 824 (9th Cir.), *cert. denied sub nom. Biderman v. Hills*, 429 U.S. 920, 97 S.Ct. 316, 50 L.Ed.2d 287 (1976); *SEC v. ESM Gov't Securities, Inc.*, 645 F.2d 310, 313 (5th Cir.1981). *But see id.* at 313 ("We do not suggest that every aspect of the law regarding an IRS summons controls an SEC subpoena.").

<sup>6</sup> District court review of the propriety of SEC actions in its investigation would also have been inappropriate because "final agency action," a prerequisite to judicial review, had not yet occurred. *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980).

ministrative summons is issued to a third party," the person being investigated "may attempt to restrain voluntary compliance by the third party, assuming [the target] is aware of the issuance of the summons prior to compliance ...." *United States v. Genser*, 582 F.2d 292, 300 (3d Cir. 1978) (emphasis added).

Appellants contend that third-party subpoena enforcement proceedings do not afford targets an adequate legal remedy unless the agency notifies them of the identities of the subpoenaed third parties. Appellants stress that the lack of such notice denies targets of an investigation the opportunity even to seek permissive intervention in enforcement proceedings. They point out further that some of the unidentified parties probably lack the ability, resources, or motive to challenge the subpoenas, especially since the investigation implicates persons other than themselves. Moreover, SEC subpoenas do not inform recipients of their right to resist; rather, the subpoenas suggest that failure to comply will result in penalties.<sup>7</sup> Appellants argue that, unless they are given notice of and an opportunity to seek intervention in any proceeding to enforce third-party subpoenas, the agency could circumvent the protections afforded by *United States v. Powell*.

The SEC argues that appellants lack standing to challenge subpoenas issued to third parties, and the district court so held.<sup>8</sup> Barring questions of privilege or other spe-

---

<sup>7</sup> See *Oklahoma Press Publishing Co.*, 327 U.S. 186, 219, 66 S.Ct. 494, 510, 90 L.Ed. 614 (1946) (Murphy, J., dissenting) ("Many persons have yielded [to an administrative subpoena] solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary even intervening."). Indeed, the third party subpoenas in this case warned each recipient that he was "hereby required to appear" before a designated SEC officer and "required to bring . . . and produce at said time and place" the documents delineated. Each subpoena contained the cryptic admonition, "Fail not at your peril."

<sup>8</sup> The SEC also asserts that courts may not impose procedural requirements upon agencies. However, the case cited by the SEC, *Steadman v. SEC*, 450 U.S. 91, 104, 101 S.Ct. 999, 1009, 67 L.Ed.2d 69 (1981), does not support this assertion. In fact, the courts have

cial circumstances, it is true that appellants have no right to protect or withhold documents held by a third party. *Donaldson*, 400 U.S. at 523, 91 S.Ct. at 538. See *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). But appellants, as targets of the investigation, do have a right to be investigated consistently with the *Powell* standards. Cf. *Powell*, 379 U.S. at 57-58, 85 S.Ct. at 254-55. As a practical matter, this is a right that only appellants would assert.

Cases involving the question of standing to object to agency process have arisen primarily in the context of IRS summonses. The Second Circuit has held that taxpayers lack standing to object to enforcement of an IRS summons directed to a third party because the taxpayers neither own nor possess the items sought by the IRS. *Foster v. United States*, 265 F.2d 183, 188 (2d Cir.), cert. denied, 360 U.S. 912, 79 S.Ct. 1297, 3 L.Ed.2d 1261 (1959). The Supreme Court has stated as a "general rule that the issuance of a subpoena to a third party to obtain the records of that party does not [itself] violate the rights of a defendant." *Miller*, 425 U.S. at 444, 96 S.Ct. at 1624. The Ninth Circuit had earlier stated that "customers have no standing to object to [grand jury or other] subpoenas requiring their banks to produce records of the 'customers' accounts." *Harris v. United States*, 413 F.2d 316, 318 (9th Cir.1969).

For at least two reasons this lack of standing rule has no application in the present matter.<sup>9</sup> The cases holding that

---

ruled to the contrary. See *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 951 (9th Cir. 1976); *FTC v. Turner*, 609 F.2d 743, 745 (5th Cir. 1980) (agencies are bound by Federal Rules of Civil Procedure when in federal courts); But see *Hoving Corp. v. FTC*, 290 F.2d 803, 807 (2d Cir. 1961) (court will not dictate to agency regarding minor procedural technicality).

<sup>9</sup> A district court articulated part of the problem of a rule denying targets standing to object to third party subpoenas:

[T]he more important problem which troubles this court is the practical disadvantage which falls upon the [target] in this situation. *Reisman v. Caplan* ... and the cases which follow it ... are based upon the premise that the summons may not be enjoined in equity because the taxpayer retains an adequate remedy at law—intervention in the government's suit to enforce the summons. But for this legal remedy to become more than a fiction it is

targets lack standing to object to process issued to third parties do so based on the premise that targets have no right to maintain the confidentiality of information held by third parties. *E.g.*, *Miller*, 425 U.S. at 444, 96 S.Ct. at 1624; *Harris*, 413 F.2d at 318. This premise is irrelevant to the present case. While appellants lack any right to maintain confidentiality of information held by third parties, they do have the right to be investigated consistently with the *Powell* standards. To assure that the target has the opportunity to assert this right, notice of third-party subpoenas is necessary.

Third-party recipients of agency process appear to lack standing to require an agency to conduct its investigation of a target consistently with *Powell*. See *Sierra Club v. Morton*, 405 U.S. 727, 733, 734-35, 92 S.Ct. 1361, 1365, 1365-66, 31 L.Ed.2d 636 (1972). Thus, denying the target notice of agency process issued to third parties necessarily denies the target the ability to assert its right to be investigated consistently with *Powell*. The target's right could be asserted by seeking permissive intervention in enforcement proceedings brought by the agency against the third party or by other appropriate district court proceedings. As a practical matter, unless the target of an SEC investigation receives notice of subpoenas served on third parties, no one will question compliance with the *Powell* standards as to those subpoenas.

Notice to targets of third-party subpoenas need not unduly burden the agency or the courts. Compliance with *Powell* can be determined on the basis of affidavits. See *Lynn v. Biderman*, 536 F.2d 820, 823 (9th Cir. 1976). Such notice will merely afford targets an opportunity to question whether agency actions comply with *Powell*.

---

necessary for the third party upon whom the summons has been issued ... to refuse to obey the summons' command. As a practical matter, few ... ever contest a .... summons .... What is significant is that the taxpayer's "adequate remedy at law" is often hollow in practical reality.

*Kirschenbaum v. Beerman*, 376 F. Supp. 398, 399-400 (W.D.Pa.1974). The court went on to hold, however, that taxpayers lacked standing to seek an injunction prohibiting their banks from producing information to the IRS. *Id.* at 400.

The Supreme Court has observed:

Since a person may ... be wholly unaware of the fact that he is being investigated until his friends who are interviewed so inform him, and since this may sometimes give rise to antagonism and a feeling that the [Securities & Exchange] Commission is besmirching him behind his back, no reason is apparent why, simply as a matter of good will, the [SEC] should not in ordinary cases send a copy of its order for investigation to the person under investigation.

*Hannah v. Larche*, 363 U.S. 420, 447 n.26, 80 S.Ct. 1502, 1517 n. 26, 4 L.Ed.2d 1307 (1959) (quoting Attorney General's Committee on Administrative Procedure, Monograph, Securities Exchange Commission 34-41). Absent special circumstances involving a serious threat to the integrity of the investigation, this rationale should apply as well to service of agency subpoenas on third parties.

### III

As to subpoenas directed to appellants as targets, subpoena enforcement proceedings provide an adequate forum in which to challenge the SEC's conduct vis-a-vis the *Powell* standards. But as to third-party subpoenas, appellants for all pretrial purposes will be denied an adequate forum unless the SEC gives them notice of the third-party subpoenas. Because such notice was not given, the district court's order as it relates to third-party subpoenas is reversed and the case remanded for proceedings consistent with the views herein expressed.

**AFFIRMED in part, REVERSED in part.**



APPENDIX B

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

No. C-81-546 RJM

JERRY T. O'BRIEN, INC., D/B/A/ PENNALUNA & Co.,  
JERRY T. O'BRIEN, BENJAMIN A. HARRISON, AND  
PENNALUNA & COMPANY, INC., PLAINTIFFS,

v.

SECURITIES AND EXCHANGE COMMISSION, DEFENDANTS.

HARRY F. MAGNUSON, AND H. F. MAGNUSON AND  
COMPANY, CROSS-PLAINTIFFS,

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
CROSS-DEFENDANTS

[Filed Mar. 25, 1982]

MEMORANDUM AND ORDER

By Order of this Court dated January 20, 1982, plaintiffs<sup>1</sup> were denied injunctive relief against subpoenas currently outstanding, or which may be issued in the future, pursuant to SEC Order of Investigation S-1555. The parties now seek a clarification of this earlier Order with respect to the status of claims at law asserted. Plaintiffs have also brought on motions for injunctive relief restraining the agency from pursuing subpoenas issued to third persons not party to this suit,<sup>2</sup> and further, for a stay pending appeal pursuant to F.R.C.P. 62(c).<sup>3</sup>

---

<sup>1</sup> For the sake of convenience, both plaintiffs and cross-plaintiffs will be referred to collectively as "plaintiffs" unless otherwise indicated.

<sup>2</sup> In the original complaint, plaintiffs asked that cross-plaintiffs be restrained from complying with various subpoenas. As the case progressed, it became clear that Magnuson would not voluntarily comply. By the time of hearing, if this topic was at issue at all, it was only marginally so. Consequently the subject was not addressed in the earlier Order and Memorandum.

<sup>3</sup> Motion was also made to compel discovery but it is my understanding that the parties have settled on a schedule acceptable to all.



### I. Legal Claims

With regard to legal claims set forth in both the original and amended complaints and cross-complaints, there appear to be potential jurisdictional issues. These remain unsettled pending full briefing by the parties.

### II. Third Party Injunctive Relief

The request for injunctive relief against third party subpoenas presents several truly novel questions. Process issued pursuant to an order of investigation is not self-executing. *United States v. Powell*, 379 U.S. 48 (1964). The party subject to a subpoena is free to resist and put the government to its proof through a judicial enforcement proceeding. *United States v. Goldman*, 637 F.2d 664, 667 (9th Cir. 1980). For the SEC to prevail, the court must conclude that agency process: (1) has been issued in pursuit of a legitimate purpose as authorized by Congress; (2) is relevant to that purpose; (3) does not seek information already in the agency's possession; and (4) is issued in accordance with proper administrative steps. *United States v. Powell*, *supra*, at 57-58.

Denial of injunctive relief in the initial Order was predicated upon the foregoing considerations. The existence of an adequate remedy at law in the form of an enforcement hearing would clearly render extraordinary relief unavailable. *Howfield, Inc. v. United States*, 409 F.2d 694, 697 (9th Cir. 1969). Since this Order issued, however, the SEC has waged an aggressive investigation, issuing numerous subpoenas in the Spokane area to various mining companies and brokers. Plaintiffs contend that the subject matter sought under these subpoenas is in substance the same as that sought under the subpoenas issued directly to the parties in this action. It is argued that the SEC is attempting an "end run" around the procedural safeguards set forth in *Powell*.

In support, plaintiffs rely heavily upon two authorities. In *Reisman v. Caplin*, 375 U.S. 440 (1964), the Supreme Court noted:

[T]hird parties might intervene [in enforcement proceedings] to protect their interests, or in the event the

taxpayer is not a party to the summons before the hearing officer, he, too, may intervene....

Nor would there be a difference should the witness indicate ... that he would voluntarily turn the papers over to the Commissioner. If this be true, either the taxpayer or any affected party might restrain compliance ... until compliance is ordered by a court of competent jurisdiction.

*Id.* at 449-50 (citations omitted).

This language suggests an inherent problem, however, in that before one may intervene in a third party enforcement proceeding, or act to restrain a third party from voluntary compliance, it is necessary that one first know of the existence of such process. The dilemma is framed in the following quote:

Where an administrative summons is issued to a third party, such as a taxpayer's bank, the taxpayer may attempt to restrain voluntary compliance by the third party, *assuming that he is aware of the issuance of the summons prior to compliance*, and he may challenge the validity of the summons by attempting to intervene in the ensuing enforcement proceedings.

*United States v. Genser*, 582 F.2d 292, 300-01 (3d Cir. 1978) (emphasis added).

The natural query at this juncture is what protections exist for the ostensible "target"<sup>4</sup> of an investigation if he is *not* aware of process outstanding against third parties. Plaintiffs suggest that the only effective remedy would be to require notice to those under investigation whenever such process is issued. The argument is not without appeal. It would be relatively easy to project a hypothetical where a government agency could effectively render the *Powell* protections a nullity. On the other hand, with equal facility, one could envision a situation where a legitimate investigation could be thwarted by the sheer weight of logistics and paperwork necessary to apprise all those who may come under individualized scrutiny as a result of third

<sup>4</sup> The term "target" is used advisedly. Plaintiffs imply that this Court "found" plaintiff O'Brien to be improperly targeted. Such a reading ignores footnote 2 of the earlier Order.

party process. In fairness to the plaintiffs, they do not purport to represent such a class and ask only for notice to themselves. Nonetheless, I am not inclined to fashion such a novel remedy under the facts as presently framed.

Plaintiffs rely heavily upon IRS cases in which a taxpayer under investigation has had his records subpoenaed under third party process issued to those to whom he has entrusted such information. There is an obvious and blatant unfairness in allowing the IRS to take advantage of the trust engendered by a relationship of an arguably confidential and sometimes fiducial nature. Indeed, in the context of IRS proceedings, Congress has recognized such inequity by enacting 26 U.S.C. § 7609 which provides for just such notice as is requested here where the information sought is in the hands of the taxpayer's bank, accountant, or attorney, as well as others with whom a confidential relationship may exist. Plaintiffs' analogy fails at this point, however, because the third parties currently under subpoena do not stand in the same posture with respect to the "target" as do those persons encompassed in § 7609. It would be stretching the IRS cases beyond their breaking point to argue that plaintiffs retained a legitimate expectation of privacy in their business transactions with the various mining companies and brokerages now under subpoena.<sup>5</sup> This is all the more true in a highly regulated field such as securities.

---

<sup>5</sup> This is not to say that case law framing the procedural methodology of enforcing process issued by the IRS may not be relevant in the instant case.

We assume, as do the parties, that the same standards are applicable to enforcement of SEC subpoenas as Internal Revenue Summonses. Thus, the subpoena issued by the Securities and Exchange Commission, 15 U.S.C. § 78u, like the administrative subpoena issued by the Federal Trade Commission, 15 U.S.C. § 49, and the Interstate Commerce Commission, 49 U.S.C. § 20 ¶ 6, as well as the administrative summonses issued under § 7602 of the Internal Revenue Code, I.R.C. § 7602, is subject to the same judicial scrutiny prior to enforcement.

*SEC v. Wheeling-Pittsburg Steel Corp.*, 648 F.2d 118, 123 n.5 (3d Cir. 1981).

In the case at hand, however, the distinction is one of substance, not procedure. See *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 313 n.3 (5th Cir. 1981) and cases cited therein.

The information sought does not "belong" to plaintiffs in the sense that they have a continuing protectable interest in its confidentiality. Rather, it "belongs" to those persons subject to subpoena, and those persons may elect to comply or resist independently of plaintiffs' asserted interests. *See generally, Donaldson v. United States*, 400 U.S. 517, 527-31 (1971).

In a word, plaintiffs have no blanket standing to intervene simply because information sought may have some relationship to their business activities. It follows that no blanket right to notice exists when such information is sought. This is not to say that a hypothetical situation could not arise in the future where the policy underlying *Reisman* might apply with equal force to an SEC subpoena directed to a "target's" confidant, but the facts as currently framed do not now support a conclusion of standing.

It could be argued, and is by defendants, that the claim of inadequate remedies at law is a red herring under the rule enunciated in *SEC v. Laird*, 598 F.2d 1162 (9th Cir 1979):

We are equally unpersuaded by the argument that information may come from this investigatory procedure which could subsequently be used in a civil or fraud suit. "Appellants may adequately protect their asserted interests by seeking to suppress such information in any subsequent proceeding."

*Id.* at 1163 (citations omitted).

It is less than crystal clear that the facts of the instant case are on direct point with *Laird*, but the thrust of that decision is unmistakable in pointing out that an adequate remedy at law may well be remedial in nature rather than preventive. Thus, on alternative bases of lack of standing and also the existence of adequate legal procedures, plaintiffs' attempt to impose a notice requirement with respect to third party process must be denied.

### *III. Stay Pending Appeal*

Plaintiffs have appealed the Order of January 20, 1982. They have further indicated that should their present motions be determined adversely, these too will be appealed. It is my understanding that an attempt will be made to con-

solidate and that the SEC will not oppose such motion. Plaintiffs argue that absent a stay pending appeal pursuant to F.R.C.P. 62(c), the issues raised will become moot. Mootness in and of itself, however, is not the type of irreparable harm which would render injunctive relief appropriate. *Jimenez v. Barber*, 252 F.2d 550 (9th Cir.), cert. denied, 355 U.S. 943 (1958). The test, rather, is as outlined in *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549 (9th Cir. 1977):

The considerations in determining whether to grant or deny the requested relief are threefold: (1) Have the Movants established a strong likelihood of success on the merits? (2) Does the balance of irreparable harm favor the Movants? (3) Does the public interest favor granting the injunction? As the Eighth Circuit has pointed out, the latter criteria merge into a single equitable judgment in which the . . . concerns of the movants must be weighed against the societal interests which will be adversely affected by granting the relief requested, a process which must be significantly affected by the realities of the situation.

*Id.* at 551 (citations omitted).

In pursuing this multi-stage inquiry, I must consider: (1) the substantiality of the issues to be appealed; (2) the nature of harm likely to be sustained by the parties both in the event a stay is granted and if it is not; (3) the public interest to be served or harmed by a stay; and (4) the latter two concerns must be balanced against the first.

#### *A. The Merits of the Issues*

For reasons covered in this memorandum and in that of January 20, I am not convinced that the plaintiffs will ultimately prevail on the merits. The *Warm Springs* test, however, should not be read to place the trial judge in the wholly untenable position of first ruling on the merits and then predicting that he will be overturned. The appropriate framework, rather, would seem to be that enunciated in *Ruiz v. Estelle*, \_\_\_ F.2d \_\_\_, slip. op. 820, 822-23 (5th Cir. January 14, 1982). This decision stands for the proposition that, under proper facts, a court may consider the *substantiality* of the issues rather than pass on the arithmetic

probabilities of eventual success. See also *Providence Journal v. Federal Bureau of Investigation*, 595 F.2d 889 (1st Cir. 1979); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* 559 F.2d 841, 843 (D.C. Cir. 1977).

While I have concluded that an SEC investigation is distinguishable from the authority cited by plaintiffs, and that they do not have standing under the facts alleged, I cannot say with certainty that this heretofore unresolved question could not be determined otherwise on appeal. The issue is intriguing, eminently arguable, and certainly substantial in the sense that the questions raised should be authoritatively determined.

#### *B. Harm*

Should a stay be denied, movants' position will be mooted. Mootness is not itself a cognizable harm. *Jimenez v. Barber, supra*. The effect of that mootness, however, may well be weighed. Plaintiffs argue that if the SEC enjoys success in its present tact of proceeding on third party subpoenas, the entire history of judicial protection against process issued in bad faith or beyond the scope of an order of investigation will be reduced to a nullity. This position is colorable. If the movants should eventually prevail, they will have sustained substantial and irreparable harm during the interim in the absence of a stay.

The harm to the SEC is somewhat more amorphous. Any judicial interference in a legitimate investigation is, of course, harmful. The nature and scope of that harm would be dependent upon a multitude of factors, such as, the breadth of any restraint, and the length of time a stay may be in effect. For example, an indeterminate stay pending review on the merits may seriously impede the ability of the SEC to fulfill its congressionally mandated function. A stay of several weeks, on the other hand, will be merely an inconvenience of minor import.

#### *C. The Public Interest*

In many respects, the public interest is inextricably intertwined with the interests of the SEC since, presumably,

that agency exists only to serve social goals. Thus, much the same type of harm likely to accrue to the SEC will also be visited upon the public. At the same time, however, society has a more expansive stake in that the continuing efficiency of government agencies such as the SEC, and the need to ensure that such agencies operate within the confines of the law, are of substantial interest to the public.

*D. Balancing the Criteria*

In viewing the substantiality of the issues, the risk of imminent and irreparable harm to the movants, the public interest in obtaining dispositive resolution of the issues, and the slight risk of harm likely to be sustained by the SEC during a brief stay, IT IS HEREBY ORDERED

that a stay of fourteen days is granted during which time movants may petition the Court of Appeals for a stay pending appeal pursuant to Ninth Circuit Rule 6(i);

that during this period the SEC shall not attempt to enforce any process currently pending under Order S-1555; nor shall any information be solicited from those to whom process under said Order has thus far been directed; nor shall such information be accepted if voluntarily profered.

IT IS SO ORDERED

DONE BY THE COURT this 25th day of March, 1982

/s/ Robert J. McNichols

---

ROBERT J. MCNICHOLS  
United States District Judge



APPENDIX C

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

No. C-81-546

JERRY T. O'BRIEN, INC. d/b/a/  
PENNALUNA & Co., ET AL., PLAINTIFFS,

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
DEFENDANTS,

HARRY F. MAGNUSON AND  
H.F. MAGUSON AND COMPANY, CROSS-PLAINTIFFS,

v.

SECURITY AND EXCHANGE  
COMMISSION, ET AL., CROSS-DEFENDANTS.

[Filed Jan. 20, 1982]

OPINION AND ORDER

*I. Statement of the Case*

Plaintiffs<sup>1</sup> ask equitable relief which contemplates enjoining the SEC from proceeding further on various outstanding subpoenas as well as other aspects of an ongoing investigation. The government currently has pending before this court a motion to dismiss all claims for lack of subject matter jurisdiction, insufficiency of service of process, and failure to state a claim for which relief can be granted.

*II. General Background*

A subpoena issued by the SEC is not self-executing. If resisted, only the courts have authority to enforce such process. *United States v. Powell*, 379 U.S. 48 (1964). The

---

<sup>1</sup> For simplicity's sake, plaintiffs Jerry T. O'Brien, Inc. d/b/a Pennaluna & Co., Jerry T. O'Brien, Benjamin A. Harrison, Pennaluna and Company, Inc., and cross-plaintiffs Harry F. Magnuson and H.F. Magnuson and Company will all be referred to collectively as "plaintiffs" unless otherwise denoted in the text.



primary concern of the court, when applying the criteria outlined below, should be the maintenance of judicial integrity by ensuring that its powers are not misused by the government to effect an abuse of process. *Powell, supra*, at 58; *United States v. Goldman*, 637 F.2d 664 (9th Cir. 1980). The burden of demonstrating abuse falls upon the person resisting the summons or subpoena. *United States v. Church of Scientology*, 520 F.2d 818, 824 (1975).

The inquiry in this case is two-fold: (1) the validity of the subpoenas (and the underlying investigation); and (2) whether pre-emptive attack on validity is appropriate. While economy would seem to dictate that only those tests relevant to pre-emptive attack be explored, these two areas of inquiry are not subject to neat segregation. It will be necessary, therefore, to take a somewhat more circuitous route and consider first, the validity of the subpoenas as though the case had progressed to the enforcement stage, and only then view the appropriateness of the extraordinary relief requested by plaintiffs in this pre-emptive attack.

### III. Validity of Subpoenas

As an initial proposition, a regulatory agency need not establish probable cause in support of its investigatory endeavors. Such an agency "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (emphasis added). This is not to say that regulatory agencies have carte blanche authority beyond review. Courts have endeavored to construct a framework whereby validity may be tested, while at the same time avoiding undue burdens upon investigatory functions. To survive judicial review, agency process must: (1) be issued in pursuit of a legitimate purpose as authorized by Congress; (2) be relevant to that purpose; (3) not seek information already in the agency's possession; and (4) be issued in accordance with proper administrative steps. *Powell, supra*, at 57-58.

### A. Legitimate Purpose

The government bears the initial burden of showing legitimate purpose. *United States v. Stuckey*, 646 F.2d 1369, 1374 (9th Cir. 1981). That burden is not a substantial one, however, and a prima facie case may be made out of little more than mere mechanical recitation of congressionally-authorized functions. See e.g., *United States v. Wyatt*, 637 F.2d 293, 301 (5th Cir. 1981). Once a threshold showing is made, the burden shifts to the person resisting enforcement to prove that the summons or subpoena in issue was promulgated in bad faith and designed to accomplish a purpose not within the contemplation of legislative intent. See *LaSalle v. National Bank*, 437 U.S. 298, 307-08 (1978).

I am satisfied that the order dated September 3, 1980 states a legitimate purpose for the investigation in section II, G with respect to all plaintiffs except O'Brien, in both his personal and corporate capacity,<sup>2</sup> who is not named [hereinafter referred to collectively as O'Brien].

### B. Relevancy to Purpose

There are no "bright lines" distinguishing the relevant from the irrelevant. It is axiomatic that there must be some articulable nexus between the announced purpose and the information sought. Put another way, the government must be prepared to show that the subject matter of the subpoena "might have thrown light" on suspected wrongdoing. *United States v. Goldman*, 637 F.2d 664, 667 (9th Cir. 1980). Relevance is tested against the query of whether there exists "a realistic expectation rather than an idle hope that something may be discovered." *Id.* (quoting *United States v. Harrington*, 388 F.2d 520, 524 (2nd Cir. 1969)). Although a nice turn of phrase, this admonition is not particularly instructive.

---

<sup>2</sup> The distinction drawn in brief and oral argument between Pennaluna & Co., Inc. and Pennaluna & Co. may be an exercise in semantical speciosity. Since the difference, if any, between these companies is irrelevant for purposes of disposing of this motion, O'Brien's claim that he was not named in the investigation order in either his personal or corporate capacity will be assumed but not decided.

More concrete is the position taken by some courts that "purpose" and "relevance" must be construed together.

[T]he Board must disclose its purpose to enable a court to make an determination of relevance. Otherwise no inquiry "into the underlying reasons for the examination" . . . . is possible. This obligation is of course not satisfied by the recital that the purpose of the investigation is to determine compliance with the law. The same could be said for any general warrant.

*CAB v. United Airlines, Inc.*, 542 F.2d 394, 402 (7th Cir. 1976) (citation omitted).

With respect to relevance, I am satisfied that section III of the order initiating investigation states a reasonable nexus between the purpose and the parties except for plaintiff O'Brien who is not named.

#### *C. Information Already in Possession*

If process were issued to obtain information already in the hands of the agency, it would be an obvious breach of the good faith requirement imposed by *Powell*. Plaintiffs argue that the presently outstanding subpoenas cover the same material already contemplated in *SEC v. G.C. George*, 637 F.2d 685 (9th Cir. 1981), a case now pending before this court on remand. The government contends that the timeframe viewed in that action is distinct from that of the present case. Plaintiffs' bare conclusory assertion to the contrary pales before the specific dates referenced in the government's subpoenas. Barring a clear "same subject matter" overlap, the SEC is not precluded from investigating matters arising subsequent in time or out of different transactions, even though the nature of the violations suspected may be similar. *United States v. Morton Salt Co.*, 338 U.S. 662 (1950). I find that there is no subject matter overlap with respect to any of the plaintiffs.

#### *D. Proper Administrative Steps*

Plaintiffs argue that 17 C.F.R. section 202, as existing at the time the subpoenas were issued, required the SEC to find a "likelihood" of existing or potential violations prior to authorizing a formal investigation. The order is abundantly clear on its face in sections II and III that all of the plain-

tiffs, except O'Brien, were suspected of "likely" violations. As O'Brien was not named in the order, he reasonably questions whether the subpoenas issued to him were processed in good faith.

The government contends that section 202 merely reflects normal agency policy and practice, and does not rise to the level of a binding regulation. O'Brien's counterargument, however, finds support in recent persuasive case law. *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 127 (3d Cir. 1981) assumed without deciding that section 202 was binding upon the agency. Thus the agency's failure to "target" plaintiff O'Brien with a "likelihood" finding casts some doubt upon the validity of the subpoenas issued to him in that a critical administrative step was left unsatisfied.

#### *IV. Equitable Relief—Pre-emptive Attack*

The foregoing conclusions were drawn only to set the stage for this area of inquiry. Courts are certainly not *per se* precluded from enjoining agency process when clear abuse is shown. Such relief is rare, however, and is controlled by stringent testing factors. Synthesizing the holdings of those courts which have addressed the issue, the following factors have been considered germane:

1. The existence of a presently justiciable case or controversy;
2. The likelihood of imminent and irreparable harm; and;
3. Whether an adequate remedy at law exists.

*Casey v. FTC*, 578 F.2d 793 (9th Cir. 1978); *Howfield, Inc. v. United States*, 409 F.2d 694 (9th Cir. 1969).

##### *A. Presently Existing Case or Controversy*

With respect to plaintiff O'Brien personally, it developed during oral argument that no subpoenas are presently outstanding against him. That he voluntarily complied with those subpoenas which were issued, and that counsel has admitted that there would have been compliance even if O'Brien had known he had been "targeted" leads me to believe that no justiciable issue exists with respect to O'Brien.

With respect to Magnuson, certain subpoenas are outstanding, but for reasons already stated, this process fully meets the four-part *Powell* test. If Magnuson cannot satisfy the requirements of his remedy at law in terms of enforcement proceedings, certainly equitable relief is not available.

*B. Likelihood of Harm*

Plaintiffs assert irreparable harm in three distinct areas. Plaintiff O'Brien asserts that he is being harassed and unnecessarily burdened with process issued in bad faith. Had he wished to preserve this claim, it would have been a simple matter to resist the subpoenas. I trust that this court or any other would have given full consideration to claims of bad faith and/or improper administrative procedure had an enforcement action been brought.

Plaintiff Harrison alleges that the SEC, through Mr. Prince, engaged in an illegal search and seizure of his personal documents located in files situated in offices of the Spokane Stock Exchange. The question of standing to bring such a challenge, and of Harrison's legitimate expectation of privacy in those files, was not briefed nor argued to the court. *See generally Rakas v. Illinois*, 439 U.S. 128 (1978). In any event, it is difficult to see how the court could grant injunctive relief against a past constitutional violation.

Plaintiff Magnuson contends that the SEC leaked confidential information to the news media; or alternatively, that an indirect leak occurred when the SEC disclosed such information to a third party who in turn leaked to a reporter. The government denies the first contention, but admits the possibility of the second. The argument is made that the SEC is required by law to convey arguably confidential information to those persons subject to investigation. That one receiving such data may have leaked information, contends the government, is entirely beyond its control.

Rather than consider the merits of this interesting argument, the issue can be disposed of with reference to the type and nature of harm claimed. Once again, plaintiffs are asking for injunctive relief against a prior wrong. There is no showing of imminent future harm, and no showing that

the SEC, even if guilty, intends a repeat performance. Further, plaintiff Magnuson's bare assertions of harm are less than adequate in the view of at least one court.

[T]he mere suggestion by appellants of possible damage to their business activities is not sufficient to block an authorized inquiry into relevant matters.

*SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).

Even if every allegation in Magnuson's complaint were true, and for purposes of this action material factual assertions are taken as true, *Kennedy v. H & M Landing, Inc.*, 529 F.2d 987 (9th Cir. 1976), no court can grant injunctive relief for a past wrong. Magnuson's remedies lie, if at all, in an action at law.

Plaintiffs rely heavily upon *Silver King Mines v. Cohen*, 261 F. Supp. 666 (D. Utah 1966) as persuasive authority for the proposition that equitable relief prohibiting dissemination of defamatory material may be granted. In that case, the court did enjoin the SEC from continuing an aggressively adverse publicity campaign against Silver King. In so doing, the court found authority in the inherent equitable powers of the judiciary; but only after also finding that no other remedy existed. The court was further prompted by a finding that SEC actions were so arbitrary and capricious as to amount to a due process violation. The publicity spawned was wholly outside the legitimate functions of the agency, and was designed solely to harrass and pressure thus rising to the level of an ultra vires enforcement action. *Id.* at 674.

The egregious conduct in *Silver King* is not present in this case. Rather, the rule emanating from *Cell Associates, Inc. v. National Institutes of Health*, 579 F.2d 1155 (9th Cir. 1978) would appear more suited. In that decision, the court noted that Congress defined specific categories of violations which would support a cause of action under the Privacy Act. Several of these permit injunctive relief. An action based on unauthorized disclosure, however, does not. The aggrieved person is left to his remedies at law as a result of clear legislative intent. *Id.* at 1159. *See also Hanley*

*v. United States Department of Justice*, 623 F.2d 1139 (6th Cir. 1980).

*C. Remedies at Law*

This memorandum and order is confined to questions relating to the extraordinary relief sought by plaintiffs. Thus, no consideration has been given to the merits or validity of any claims based on violations of civil rights legislation, the Privacy Act, or any other remedy at law for past harms allegedly suffered. Dismissal of the equitable portions of the complaints will not prejudice plaintiffs' future efforts at redress in these areas.

The sole concern at present is whether the subpoenas still outstanding, and the SEC's general investigation of the parties, is subject to pre-emptive attack at a matter of equity. Long-held case law suggests that plaintiffs' ability to resist enforcement of whatever subpoenas are now outstanding or may become so in the future, and to put the government to its proof, is sufficient protection against process issued in bad faith. *Reisman v. Caplin*, 375 U.S. 440 (1963); *Howfield, Inc. v. United States*, 409 F.2d 694 (9th Cir. 1969).

The government's Motion to Dismiss plaintiffs' claims for equitable relief is GRANTED, and dismissal shall be without prejudice to any claims at law that plaintiffs may wish to pursue.

IT IS SO ORDERED.

DONE BY THE COURT this 20th day of January, 1982.

/s/ Robert J. McNichols

---

ROBERT J. MCNICHOLS

United States District Judge



APPENDIX D

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Nos. 82-3108, 82-3109, 82-3185

JERRY T. O'BRIEN, INC., DOING BUSINESS AS  
PENNALUNA & CO., ET AL., PLAINTIFFS-APPELLANTS.

*v.*

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
DEFENDANTS-APPELLEES,

*and*

HARRY F. MAGNUSON AND H.F. MAGNUSON & COMPANY,  
CROSS-PLAINTIFFS-APPELLANTS,

*v.*

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
CROSS-DEFENDANTS-APPELLEES.

[Filed Sept. 30, 1983]

ORDER

Before: SKOPIL, PREGERSON, and FERGUSON, Circuit  
Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and an active judge called for an en banc vote. The matter failed to receive the vote of a majority of the active judges in favor of en banc consideration. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.



## APPENDIX E

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Nos. 82-3108, 82-3109, 82-3185

JERRY F. O'BRIEN, INC.

v.

SECURITIES AND EXCHANGE COMMISSION

[Filed Oct. 28, 1983]

KENNEDY, Circuit Judge, with whom SNEED, ANDERSON, POOLE, and NORRIS, Circuit Judges, join, dissenting from denial of rehearing en banc:

Our court, once again, gives a simple shrug when requested to invoke the short en banc procedure permitted us by Congress. 28 U.S.C. § 46(c)B(d). We decline to review a panel decision that is novel, of vast importance, and, in my view, most erroneous. Our refusal to review panel decisions of this type imposes an unnecessary burden on the Supreme Court. I dissent from the failure of the court to consider the case en banc.

The rule set forth by the panel opinion goes beyond any reasonable interpretation of the Supreme Court's opinions in *United States v. Powell*, 379 U.S. 48 (1965), and *United States v. Miller*, 425 U.S. 435 (1976); is an unwarranted extension of, if not in open conflict with, our own opinions in *Kelley v. United States*, 536 F.2d 897 (9th Cir. 1976), *cert. denied*, 429 U.S. 1047 (1977), and *Howfield, Inc. v. United States*, 409 F.2d 694 (9th Cir. 1969); and is an improper intrusion on the administrative function.

There is no principled basis for confining the panel holding to the context of an SEC investigation. It threatens to compromise government investigations by most agencies. Not only will wrongdoers be provided a new instrument of obstruction or delay, but also employees and others subject to reprisals will be chilled from cooperating with investigators. Under the panel decision, government agencies will

find it increasingly difficult to conduct confidential, non-public investigations in which actual targets are not discovered until a number of subpoenas have been served. Agencies may instead be forced to articulate premature conclusions about potential targets.

The panel decision should have been taken en banc.

**APPENDIX F**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

No. 83-6035

DC# CV 83-3961 (CBM)

**WEDBUSH, NOBLE, COOKE, INC., PLAINTIFFS-APPELLEES,**

*v.*

**SECURITIES AND EXCHANGE COMMISSION,  
DEFENDANT-APPELLANT.**

---

Appeal from the United States District Court  
for the Central District of California

Consuelo B. Marshall, District Judge, Presiding  
Submitted August 22, 1983

[Filed Aug. 30, 1983]

**OPINION**

**BEFORE: HUG, TANG and NORRIS, Circuit Judges  
NORRIS, Circuit Judge**

**FACTS**

Appellant Securities and Exchange Commission (SEC) is conducting a formal, administrative investigation of Wedbush, Nobel, Cooke, Inc. (Wedbush), a registered securities brokerage firm with offices in Los Angeles and other western cities. The investigation concerns suspected violations of the anti-fraud and anti-manipulation provisions of the securities laws by Wedbush and its customers.

The SEC had issued subpoenas to numerous witnesses whose testimony was sought in connection with its investigation. No notice of these subpoenas was given directly to Wedbush, the target of the investigation. The SEC contends that some of the third-party witnesses had requested confidentiality and that disclosure of these witnesses to the target would impair the effectiveness of the investigation.

Wedbush brought an action in the district court seeking an injunction against continuation of the investigation without notification to them of the third-parties subpoenaed by the SEC. The district court, relying primarily on the decision of this court in *Jerry T. O'Brien, Inc. v. S.E.C.*, 704 F.2d 1065 (9th Cir. 1983), granted the injunctive relief requested. The court specifically found that the balance of hardships did not favor the SEC, that the public interest favored the injunction, and that the SEC did not have a strong likelihood of success on the merits, in view of the recent decision in *O'Brien*, *supra*.

The SEC filed a notice of appeal and now seeks an emergency stay of the district court's injunction pending its appeal.<sup>1</sup>

### DISCUSSION

It is clear that this court's decision in *O'Brien* is directly on point as to the target's right to receive notification of SEC investigative subpoenas issued to third parties. *Jerry T. O'Brien, Inc. v. S.E.C.*, 704 F.2d at 1068-69. The SEC attempts to avoid its impact in this case by arguing that *O'Brien* is not authoritative because its petition for rehearing has stayed the mandate in that case pursuant to Fed. R. App. P. 41(a). We reject that argument.

The judgment of this court in *O'Brien* was entered on the court's docket on April 25, 1983 and the opinion was duly forwarded for publication. After receiving an extension of time the SEC filed a petition for rehearing and the mandate was stayed by the Clerk under Fed. R. App. P. 41(a).<sup>2</sup> It

---

<sup>1</sup> The emergency motion for stay was denied by way of an order which indicated that a statement of reasons would follow. This opinion explains our prior action.

<sup>2</sup> It is not even clear that the filing of a motion for an extension of time to seek rehearing should have the effect of staying the mandate. See *United States v. Barela*, 571 F.2d 1108, 1110-15 (9th Cir. 1978) (Ferguson, J., dissenting); 16 Wright & Miller, *Federal Practice and Procedure* § 3987, p. 474 (1977). Nevertheless, it is the practice of the clerk of this court to withhold the mandate where a timely motion of this type is filed and granted. Such informal procedures illustrate the largely ministerial function of the mandate. See D. Knibb, *Federal Court of Appeals Manual* § 25.2, p. 274 (1981).

does not follow, however, that the judgment of the court in that case is without effect.

It is fundamental that the mere pendency of an appeal does not, in itself, disturb the finality of a judgment. See *Hovey v. McDonald*, 109 U.S. 150, 161 (1883); 9 J. Moore, *Federal Practice* ¶ 208.03 at 1407-08. Similarly, the pendency of a petition for rehearing does not, in itself, destroy the finality of an appellate court's judgment. See *Deering Milliken, Inc. v. F.T.C.*, 647 F.2d 1124, 1128-29 (D.C. Cir. 1978); *Amoco Oil Company v. Zarb*, 402 F. Supp. 1001, 1008 (D.D.C. 1975). Thus, even though the mandate has not yet issued in *O'Brien*, the judgment filed by the panel in that case on April 25, 1983 is nevertheless final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court.

Accordingly, we find that the district court in this case correctly relied on *O'Brien* to conclude that Wedbush had demonstrated a likelihood of success on the merits for purposes of granting preliminary relief. For the same reasons we conclude that the SEC has not demonstrated a strong likelihood of success on the merits of its appeal. Finally, we do not find that the balance of hardships tips strongly in favor of the SEC or that the public interest requires granting a stay in this case. The motion for a stay of the district court's injunction pending appeal is therefore denied. See, e.g., *Sports Form, Inc. v. United Press International, Inc.*, 686 F.2d 750, 752-53 (9th Cir. 1982).

## APPENDIX G

Section 19(a) of the Securities Act of 1933, 15 U.S.C. 77s(a), provides, in pertinent part:

The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this subchapter.

Section 19(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), provides:

For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

Section 22(b) of the Securities Act of 1933, 15 U.S.C. 77v(b), provides:

In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a), provides, in pertinent part:

The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this title [or] the rules or regulations thereunder \* \* \* \*. The Commission is authorized in its discretion to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions.

Section 21(b) of the Securities and Exchange Act of 1934, 15 U.S.C. 78u(b), provides, in pertinent part:

For the purpose of any \* \* \* investigations \* \* \* any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other other records which the Commission deems relevant or material to the inquiry.

Section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(c), provides:

In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Section 23(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78w(a)(1), provides, in pertinent part:

The Commission \* \* \* shall \* \* \* have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title.

Section 18 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79r, provides, in pertinent part:

(a) The Commission, in its discretion, may investigate any facts, conditions, practices, or matters which it may deem necessary or appropriate to determine whether any person has violated or is about to violate any provision of this chapter or any rule or regulation thereunder, or to aid in the enforcement of the provisions of this chapter, in the prescribing of rules and regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(b) The Commission upon its own motion or at the request of a State commission may investigate, or obtain any information regarding the business, financial condition, or practices of any registered holding company or subsidiary company thereof or facts, conditions, practices, or matters affecting the relations between any such company and any other company or companies in the same holding-company system.

(c) For the purpose of any investigation or any other proceeding under this chapter, any member of the Commission, or any officer thereof designated by it, is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

(d) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an



order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who, without just cause, shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or both.

Section 20(a) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79t(a), provides, in pertinent part:

The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this chapter, including rules and regulations defining accounting, technical, and trade terms used in this chapter.

Section 319(a) of the Trust Indenture Act of 1939, 15 U.S.C. 77sss(a), provides, in pertinent part:

The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate in the public interest or for the protection of investors to carry out the provisions of this subchapter, including rules and regulations defining accounting, technical, and trade terms used in this subchapter.

Section 321(a) of the Trust Indenture Act of 1939, 15 U.S.C. 77uuu(a), provides:

For the purpose of any investigation or any other proceeding which, in the opinion of the Commission, is necessary and proper for the enforcement of this subchapter, any member of the Commission, or any officer

thereof designated by it, is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such books, papers, correspondence, memoranda, contracts, agreements, or other records may be required from any place in the United States or in any Territory at any designated place of investigation or hearing. In addition, the Commission shall have the powers with respect to investigations and hearings, and with respect to the enforcement of, and offenses and violations under, this subchapter and rules and regulations and orders prescribed under the authority thereof, provided in sections 77t and 77v(b), (c) of this title.

Section 38(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-37(a), provides, in pertinent part:

The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the powers conferred upon the Commission elsewhere in this subchapter, including rules and regulations defining accounting, technical, and trade terms used in this subchapter, and prescribing the form or forms in which information required in registration statements, applications, and reports to the Commission shall be set forth.

Section 41(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-40(a), provides, in pertinent part:

The Commission may make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this subchapter or of any rule, regulation, or order hereunder, or to determine whether any action in any court or any proceeding before the Commission shall be instituted under this subchapter against a particular person or persons, or with respect to a particular transaction or transactions.

Section 41(b) of the Investment Company Act of 1940, 15 U.S.C. 80a-40(b), provides:

For the purpose of any investigation or any other proceeding under this subchapter, any member of the Commission, or any officer thereof designated by it, is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

Section 41(c) of the Investment Company Act of 1940, 15 U.S.C. 80a-40(c), provides:

In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who without just cause shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or both.

Section 209(a) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-9(a) provides:

Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter or of any rule or regulation prescribed under the authority thereof, have been or are about to be violated by any person, it may in its discretion require, and in any event shall permit, such person to file with it a statement in writing, under oath or otherwise, as to all the facts and circumstances relevant to such violation, and may otherwise investigate all such facts and circumstances.

Section 209(b) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-9(b), provides:

For the purposes of any investigation or any proceeding under this subchapter, any member of the Commission or any officer thereof designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

Section 209(c) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-9(c), provides:

In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in

question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who without just cause shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or both.

Section 211(a) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-11(a), provides:

The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this subchapter. For the purposes of its rules or regulations the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters.

NO. 83-751

**IN THE  
Supreme Court of the United States**

OCTOBER TERM, 1983

Office-Supreme Court, U.S.

FILED

DEC 10 1983

ALEXANDER L. STEVAS,  
CLERK

---

SECURITIES AND EXCHANGE COMMISSION, et al.,  
Petitioners

v.

JERRY T. O'BRIEN, INC., et al.  
Respondents

---

BRIEF IN OPPOSITION  
TO PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

LeSOURD & PATTEN  
C. DEAN LITTLE

Attorneys for Respondents  
Jerry T. O'Brien, Inc.,  
Jerry T. O'Brien,  
Pennaluna & Company, Inc.,  
and Benjamin A. Harrison

3900 Seattle-First National  
Bank Building  
Seattle, Washington 98154  
Telephone: (206) 624-1040

QUESTION PRESENTED

Whether a target of a Securities and Exchange Commission investigation should be given notice of an administrative subpoena issued to a third party.



PARTIES TO THE PROCEEDING

Respondent Jerry T. O'Brien, Inc., is a securities broker-dealer with offices in Wallace, Kellogg, and Coeur d'Alene, Idaho, and Spokane, Washington. Its principal shareholder and chief officer is respondent Jerry T. O'Brien. (Hereafter these respondents shall be referred to as "respondents O'Brien".)

Respondent Benjamin A. Harrison is sole shareholder of respondent Pennaluna & Company, Inc., a private investment company of Mr. Harrison. Prior to June, 1970, Pennaluna & Company, Inc., was a securities broker-dealer; it now licenses its name to respondents O'Brien. Mr. Harrison is an employee of Jerry T. O'Brien, Inc., and is also secretary of the Spokane Stock Exchange, a national securities exchange. (Hereafter these respondents shall be referred to as "respondents Harrison".)

Co-respondent H. F. Magnuson & Company is the accountant for Jerry T. O'Brien, Inc., and for Pennaluna & Company, Inc. Co-respondent H. F. Magnuson is also a customer of Jerry T. O'Brien, Inc. (Hereafter these respondents shall be referred to as "respondents Magnuson".)

Respondents Jerry T. O'Brien, Inc., and Pennaluna & Company, Inc., have no parent, subsidiary, or affiliate corporations.

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT .....	1
II. REASONS FOR DENYING PETITION ....	6
A. The Court of Appeals' Decision Is Based upon Statute and Decisions of this Court .....	9
B. The Court of Appeals' Decision Is Not Contrary to Other Decisions .....	21
C. Agency Investigations Are Not Grand Jury Investigations .....	25
III. CONCLUSION .....	37
ADDENDUM .....	38
APPENDIX .....	40

TABLE OF AUTHORITY  
Table of Cases

<u>Branzburg v. Hayes,</u> 408 U.S. 665, (1972) .....	29
<u>CAB v. United Airlines, Inc.,</u> 542 F.2d 394 (7th Cir. 1976) .....	39
<u>Chapman v. Maren Elwood College,</u> 225 F.2d 230 (9th Cir. 1955) .....	39

<u>Cole, In Re Application of,</u> 237 F. Supp. 274 (S.D.N.Y. 1964), <u>rev'd</u> , 342 F.2d 5 (2d Cir. 1965), <u>cert. denied</u> , 381 U.S. 950 (1965) .....	21-25
<u>Cudahy Packing Co. v. Holland,</u> 315 U.S. 357 (1942) .....	18
<u>Donaldson v. US,</u> 400 U.S. 517 (1971) .....	11,20,22-24
<u>FCC v. Schreiber,</u> 381 U.S. 279 (1965) .....	18,19
<u>Hannah v. Larche,</u> 363 U.S. 420 (1960) .....	25,27-29
<u>Hellenic Lines, Ltd. v. Federal Marine Board,</u> 295 F.2d 138 (D.C. Cir. 1961) .....	39
<u>Howfield, Inc. v. United States,</u> 409 F.2d 694 (1969) .....	21
<u>Kelley v. United States,</u> 536 F.2d 897 (1976) .....	21
<u>Leedom v. Kyne,</u> 358 U.S. 184 (1958) ..	10
<u>Lynn v. Biderman,</u> 536 F.2d 820 (9th Cir. 1976) <u>cert. denied</u> , 429 U.S. 920 .....	39
<u>Montship Lines, Ltd. v. Federal Maritime Board,</u> 295 F.2d 147 (D.C. Cir. 1961) .....	39
<u>Oklahoma Press Publishing Co. v. Walling,</u> 327 U.S. 186 (1946) ...	10-12, 14,27,33

	<u>Page</u>
<u>Penfield Co. of California v. SEC,</u> 330 U.S. 585 (1947) .....	11
<u>PepsiCo, Inc. v. SEC,</u> 563 F. Supp.828 (S.D.N.Y. 1983) ....	25
<u>Prairie Band of Pottawatomie</u> <u>Tribe of Indians v. Udall,</u> 355 F.2d 364 (10th Cir. 1966) .....	24
<u>Reisman v. Caplin,</u> 375 U.S. 440 (1964) .....	6,11,12, 15,22,36
<u>Scarafiotti v. Shea,</u> 456 F.2d 1052 (10th Cir. 1972) .....	21,23,24
<u>SEC v. Brigadoon Scotch</u> <u>Distributing Co.,</u> 480 F.2d 1047 (2d Cir. 1973) .....	19,38
<u>SEC v. Csapo,</u> 533 F.2d 7 (D.C. Cir. 1976) .....	18,20
<u>SEC v. ESM Government Securities,</u> <u>Inc.,</u> 645 F.2d 310 (5th Cir. 1981) .....	2,27-29, 37,38
<u>SEC v. Higashi,</u> 359 F.2d 550 (9th Cir. 1966) .....	19
<u>SEC v. Howatt,</u> 525 F.2d 226 (1st Cir. 1975) .....	38
<u>SEC v. Magnuson,</u> No. C82-362V (W.D. Wash.), No. C82-282 (E.D. Wash.) .....	6
<u>SEC v. Wall Street Transcript Corp.,</u> 422 F.2d 1371 (2d Cir. 1970) <u>cert. denied</u> 398 U.S. 958 .....	38

<u>SEC v. Wheeling-Pittsburgh Steel Corp.,</u> 648 F.2d 118 (3d Cir. 1981) .....	3,38
<u>Shasta Minerals &amp; Chemical Co. v. SEC,</u> 328 F.2d 285 (10th Cir. 1964) .....	3,39
<u>Silver King Mines, Inc. v. Cohen,</u> 261 F. Supp. 666 (D.C. Utah 1966) ..	3,39
<u>US v. Baggot, _____ U.S. _____,</u> 77 L. Ed. 2d 785 (1983) .....	1,30
<u>US v. Blue,</u> 384 U.S. 251 (1966) .....	20
<u>US v. Fensterwald,</u> 553 F.2d 231 (D.C. Cir. 1977) .....	39
<u>US v. Genser,</u> 582 F.2d 292 (3d Cir. 1978) .....	15,38
<u>US v. Harrington,</u> 388 F.2d 520 (2d Cir. 1968) .....	16,38
<u>US v. Janis,</u> 428 U.S. 433 (1976) .....	21
<u>US v. Matras,</u> 487 F.2d 1271 (8th Cir. 1973) .....	39
<u>US v. McCarty,</u> 514 F.2d 368 (3d Cir. 1975) .....	38
<u>US v. Menker,</u> 350 U.S. 179 (1956) ....	18
<u>US v. Miller,</u> 425 U.S. 435 (1976) ....	25
<u>US v. National State Bank,</u> 454 F.2d 1249 (7th Cir. 1972) .....	39
<u>US v. Powell,</u> 379 U.S. 48 (1964) ....	6,9, 11,12,14-16, 19,23,24,27,39

<u>US v. Roundtree,</u> 420 F.2d 845 (5th Cir. 1969) .....	38
<u>US v. Salter,</u> 432 F.2d 697 (1st Cir. 1970) .....	38
<u>US v. Schutterle,</u> 586 F.2d 1201 (8th Cir. 1978) .....	21
<u>US v. Sells Engineering, Inc.,</u> U.S. _____, 77 L. Ed. 2d 743 (1983) .....	6,9,20,26-31
<u>US v. Theodore,</u> 479 F.2d 749 (4th Cir. 1973) .....	16
<u>US v. Wright Motor Co., Inc.,</u> 536 F.2d 1090 (5th Cir. 1976) .....	37
<u>Wild v. US,</u> 362 F.2d 206 (9th Cir. 1966) .....	39

### Statutes, Rules and Regulations

#### Federal Rules of Civil Procedure

Rule 16 .....	33
26(b) .....	33
26(c) .....	33
30(b) .....	36
30(d) .....	34
31(a) .....	36
34(b) .....	36
37 .....	34
45 .....	36

#### Federal Rules of Criminal Procedure

Rule 6(e) .....	26,30
-----------------	-------

#### Privacy Act

5 U.S.C. 552a .....	3
---------------------	---



PageRight to Financial Privacy Act

12 U.S.C. 3401-3421 .....	31
3405 .....	32
3417 .....	32

Securities Act of 1933

§ 19(b), 15 U.S.C. 77s(b) .....	7,40
20(a), 15 U.S.C. 77t(a) .....	7,13,40
20(b), 15 U.S.C. 77t(b) .....	13
22(b), 15 U.S.C. 77v(b) .....	4,7

Securities Exchange Act of 1934

§ 21(a), 15 U.S.C. 78u(a) .....	7,13,40
21(b), 15 U.S.C. 78u(b) .....	7,13,40
21(c), 15 U.S.C. 78u(c) .....	4,7,13,40

SEC Rules of Practice

17 C.F.R. 203.5 .....	3
17 C.F.R. 203.7(a) .....	3
28 U.S.C. § 1337 .....	10

Other Authority

H. Bloomenthal, Vol. 3, <u>Securities Law Series, Securities and Federal Corporate Law</u> , § 1.12[4] at 1-50.14 .....	34
---	----

H. R. Rep. No. 1321, 96th Cong.

2d Sess. 2 (1980) .....	2,32
-------------------------	------

NO. 83-751

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

---

SECURITIES AND EXCHANGE COMMISSION,  
et al.,  
Petitioners

v.

JERRY T. O'BRIEN, INC., et al.,  
Respondents

---

BRIEF IN OPPOSITION  
TO PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

I. STATEMENT

Respondents are targets of an SEC investigation.<sup>1/</sup> Respondents filed this lawsuit in September, 1981. Respondents claimed that the SEC and its agents

---

<sup>1/</sup> The subject matter of any investigation is some person's conduct. A person whose conduct is under investigation is commonly called a "target" of the investigation. See, for example, U.S. v. Baggot, \_\_\_ U.S. \_\_\_, 77 L. Ed. 2d 785 (1983). With respect to a particular target, a third-party is any other person or entity.

were conducting the investigation in excess of statutory authority.<sup>1/</sup> Respondents continue to assert these claims. Respondents sought to enjoin SEC conduct, and also sought to restrain

---

<sup>1/</sup> Respondents alleged the following: (1) SEC agents had obtained documents from respondents O'Brien by misleading respondents and their attorneys as to their status as targets. See SEC v. ESM Government Securities, Inc., 645 F.2d 310 (5th Cir. 1981); (2) SEC agents were acting beyond the authority granted to them by the Commission in formal order of investigation (FOI) S-1555 by investigating respondents O'Brien, and by investigating alleged violations of additional provisions not specified in the FOI.

"Subpoenas are enforceable only to the extent that they seek information which is reasonably relevant to matters within the scope of the formal order of investigation. Should the staff uncover information indicating the advisability of pursuing possible violations not embodied within the scope of the formal order, it must return to the Commission and seek an amendment to the order." H. R. Rep. No. 1321, 96th Cong. 2d Sess. 2 (1980) reprinted (1980) U.S. Code Cong. & Admin. News, 3877 n.2.

co-respondents Magnuson from complying with SEC subpoenas issued to them. Co-respondents voluntarily declined compliance, and cross-claimed against the SEC. On January 20, 1982, the district court declined equitable relief. The district court held that, because there existed outstanding SEC subpoenas to respondent

---

1/ (Continued):

See SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 130 (3d Cir. 1981); (3) SEC agents had intentionally made disclosure of the non-public FOI to news media for illegitimate purposes and in violation of SEC regulation and the Privacy Act. See 5 U.S.C. 552a; SEC Reg. §§ 203.5 and 203.7(a), 17 C.F.R. §§ 203.5 and 203.7(a); Silver King Mines, Inc. v. Cohen, 261 F. Supp. 666 (D.C. Utah 1966); Shasta Minerals & Chemical Co. v. SEC, 328 F.2d 285 (10th Cir. 1964); (4) SEC agents had surreptitiously obtained access to private documents of respondent Harrison in bad faith and in violation of his right to privacy; (5) SEC agents had issued subpoenas to respondents and co-respondents which were without legitimate purpose, unspecific in purpose, overbroad, improperly issued, and requesting information already in the SEC's possession.

Pennaluna & Company, Inc., and to co-respondents Magnuson, an SEC action to enforce these subpoenas under Section 22(b) of the Securities Act, 15 U.S.C. 77v(b), and Section 21(c) of the Exchange Act, 15 U.S.C. 78u(c), provided to respondents an adequate remedy at law.

Thereafter, the SEC brought no subpoena-enforcement action against respondents or co-respondents. However, as the district court itself found, the SEC "waged an aggressive investigation, issuing numerous subpoenas" to third parties. (Dist. Ct. Order, March 25, 1982, Petition, p. 10a.) Respondents alleged in district court, and the SEC did not deny, that the SEC was issuing third-party subpoenas which were unknown to respondents and beyond the scope of their awareness. Respondents requested the district court to order the SEC to provide respondents with notice of third

party subpoenas. Without notice, respondents would have no opportunity to question the SEC's exercise of authority, and thus no adequate remedy at law. On March 25, 1982, the district court declined to order notice. But in doing so the court stated:

"I cannot say with certainty that this heretofore unresolved question could not be determined otherwise on appeal." Dist. Ct. Order, March 25, 1982, Petition, p. 15a.)

Respondents timely appealed to the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the district court and held that the SEC must give respondents notice of third-party subpoenas.<sup>1/</sup>

---

<sup>1/</sup> Throughout the proceedings in district court, the SEC had not initiated a subpoena-enforcement action on any outstanding subpoenas. On April 1, 1982, the SEC finally commenced an action against respondent Pennaluna & Company, Inc., co-respondents, and certain third parties. The action was filed in the Western District of Washington, although

## II

REASONS FOR DENYING PETITIONSummary of Argument

The decision of the Court of Appeals is based upon statute and upon this Court's decisions in United States v. Powell, 379 U.S. 48 (1964), and Reisman v. Caplin, 375 U.S. 440 (1964). The Court of Appeals' decision is consistent with the reasoning of other decisions of this Court, including the recent decision in United States v. Sells Engineering, Inc., \_\_ U.S. \_\_, 77 L. Ed. 2d 743 (1983). The Court of Appeals' decision disposes of an issue of first impression, which has not been considered by any other court of appeals. The Court of

---

1/ (Continued): the defendants and the documents subpoenaed were in the Eastern District or in Idaho. The Western District changed venue to the Eastern District of Washington. The action is currently pending. SEC v. Magnuson, No. C82-362V (W.D. Wash.), No. C82-282 (E.D. Wash.).



Appeals' decision merely makes effective the statutory process of Sections 19(b), 20(a), and 22(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), 77t(a), and 77v(b), and Sections 21(a)-(c) of the Exchange Act of 1934, 15 U.S.C. 78u(a)-(c).

The Court of Appeals' decision creates no new rights or remedies. The decision is merely an elaboration of existing law. Under statute, the SEC can make investigations and issue agency subpoenas only within the scope of its authority. Under statute, a person who receives an agency subpoena need not comply until the SEC, in a subpoena-enforcement action, shows the court that it is conducting its investigation within its authority. Under existing decision, if the target of an SEC investigation is aware of a subpoena to a third party, then the target may petition the court to

enjoin compliance and may petition the court to intervene in the enforcement action. Under existing law, the Court, in its discretion, may or may not grant such petitions; but, in either event, the target has opportunity to question the lawfulness of SEC conduct. Therefore, under existing law, the target who has notice of a third-party subpoena has an adequate, statutory remedy at law for SEC action in excess of authority. The Court of Appeals' decision merely makes explicit that notice is necessary to implement an existing statutory remedy.

The Court of Appeals' decision does not threaten to seriously impede SEC investigations. The decision does not limit the SEC's investigatory discretion. The decision does not involve the courts in SEC determinations concerning who, what, why, when, and where to investigate. The decision does not

involve the courts in supervising SEC investigations, except to the extent that Congress has provided in express statute. The Court of Appeals' decision does not impose on the SEC any new legal duty beyond compliance with existing law. The Court of Appeals' decision only reinforces a statutory check and balance designed to insure the legitimacy of, and public confidence in, SEC action.

A. The Court of Appeals' Decision Is Based upon Statute and Decisions of this Court.

Congress has given the SEC "limited authority" to undertake investigations. Sells Engineering, supra, 77 L. Ed. 2d 758. The SEC must exercise its authority in compliance with the statutory standards granting investigatory authority. Powell, supra.<sup>1/</sup>

---

<sup>1/</sup> An agency has a "duty" to act within the scope of its statutory authority. A citizen has a corresponding

Congress has given the SEC the authority to issue agency subpoenas in the course of exercising its investigative authority. However, Congress has withheld from the SEC the authority to enforce its subpoenas. Congress has required that the SEC must bring on a subpoena-enforcement action before the district court.<sup>1/</sup> Section 22(b) of the

---

<sup>1/</sup> (Continued): "right" to be subjected only to agency action which is within its statutory authority. Congress intends such right to be enforced. The courts have jurisdiction to protect citizens from "agency action taken in excess of delegated powers", and may fashion an adequate remedy. Leedom v. Kyne, 358 U.S. 184, 190 (1958); 28 U.S.C. § 1337.

<sup>1/</sup> Congress has left enforcement of an agency subpoena or summons to the discretion of the court. Oklahoma Press, 327 U.S. at 217 n.57. The court's role is "neither minor nor ministerial". Id. As Justice Frankfurter once stated:

"The power of Congress to impose on courts the duty of enforcing obedience to an administrative subpoena was sustained precisely because courts were not to be automata

Securities Act and Section 21(c) of the Exchange Act. Although an SEC investigation may be nonadjudicatory, in contrast, a subpoena-enforcement action is an adversary proceeding involving the SEC, parties subpoenaed, and, upon intervention, those parties "affected by disclosure".<sup>1/</sup> Reisman, supra, 375 U.S. 445-46; Powell, supra; Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

---

<sup>1/</sup> (Continued): carrying out the wishes of the administrative. They were discharging judicial power with all the implications of the judicial function in our constitutional scheme." Penfield Co. of California v. SEC, 330 U.S. 585, 604 (1947) (dissenting opinion).

<sup>1/</sup> A target is an "affected" party. Reisman, supra. Intervention is permissive, and will be allowed or denied upon the "usual process of balancing the equities." Donaldson v. U.S., 400 U.S. 517, 530 (1971). Consistent with Powell standards, a target will be allowed to intervene if the material is sought for an "improper purpose". Donaldson, supra, 400 U.S. 589.

An SEC investigative subpoena must be issued only as authorized by law. Oklahoma Press, supra. Courts will not enforce an agency subpoena unless the SEC meets its burden of showing that it is exercising investigatory power within statutory limits. As this Court stated in Powell:

"Reading the statutes as we do . . . [the agency] must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the [agency's] possession, and [4] that the administrative steps required by the Code have been followed. . . ." (Emphasis added.) 379 U.S. 57-58.

If, and only if, the court determines that the SEC has made such showing, then the burden shifts to the opposing party to challenge "on any appropriate ground".

Reisman, supra, 375 U.S. 449.<sup>1/</sup>

---

<sup>1/</sup> Like the IRS statute in Powell, Congress clearly intended that each SEC investigation initiated by the SEC would

Congress has accomplished two purposes by requiring the SEC to initiate a subpoena-enforcement action. First, Congress has engaged the courts to give "judicial supervision" to the SEC's exercise of its investigatory authority and to thus check and balance possible abuse.

---

2/ (Continued) have some "subject matter" of inquiry. The 1933 Act contemplates each investigation would inquire into "facts and circumstances concerning the subject matter". 15 U.S.C. § 77t(a). The 1934 Act contemplates each investigation would inquire into "facts, conditions, practices, or matters". § 78u(a). Congress also intended that each investigation have a "purpose", and it specifically authorized the SEC to issue subpoenas only for "the purpose of any such investigation". § 78u(b). See also § 77t(b) (1933 Act). Congress specifically provided that subpoenaed testimony or documents be "relevant or material to the inquiry" of such investigation. § 77t(b) (1933 Act); § 78u(b) (1934 Act). Congress further provided that upon the SEC's petition for enforcement, the "court may issue an order requiring" production of documents or testimony "touching the matter under investigation or in question". § 78u(c) (1934 Act).



Oklahoma Press, supra, 327 U.S. at 217.<sup>1/</sup> Second, Congress has provided an adversary forum in which persons affected by SEC subpoenas may question the lawfulness of SEC investigatory action.<sup>1/</sup>

---

<sup>1/</sup> The agency is authorized to investigate, "but the Act makes [its] right to do so subject in all cases to judicial supervision. Persons from whom [it] seeks relevant information are not required to submit to [its] demand, if in any respect [it] is unreasonable or over-~~reaches~~ the authority Congress has ~~given~~ <sup>granted</sup> to it, they may make 'appropriate defense' surrounded by every safeguard of judicial restraint." Oklahoma Press, supra, 327 U.S. 216-17 (footnotes and citations omitted).

<sup>1/</sup> An SEC subpoena is coercive. But its coercive force results only from the court's ability to enforce it. When the SEC issues a subpoena, it therefore invokes the process of the court. In issuing a subpoena, the SEC announces, in effect, "if you do not comply, we will take you to court". The SEC thus announces that it can meet the Powell requirements. An SEC subpoena which is issued in violation of the Powell requirements is thus an abuse of the court's process. The "Court may not permit its process to be abused". Powell, supra, 379 U.S. 58.

In the course of an investigation, the SEC issues subpoenas to targets and to third-party witnesses. If a target "is aware of the issuance of the [third-party subpoena] prior to compliance", then that target has opportunity to question the SEC's exercise of authority in issuing the subpoena. United States v. Genser, 582 F.2d 292, 300-01 (3d Cir. 1978); Reisman, supra. The target can contact the third party and request noncompliance, or the target may petition the court to "restrain compliance . . . until compliance is ordered" in a subpoena-enforcement action. Reisman, supra, 375 U.S. 449-50. The target may, as a party affected by disclosure, seek to intervene in any enforcement action and ask the court to assure SEC compliance with the statutory standards of Powell. Because a target has the foregoing opportunities to put the SEC to

its proof of showing legitimacy, the statutory subpoena-enforcement action constitutes an adequate remedy at law, preventing SEC abuse of investigatory authority.<sup>10/</sup>

However, if the target is not aware of the issuance of third-party subpoenas, then the subpoena-enforcement action is not an adequate remedy at law. The Congressionally-mandated forum for scrutinizing the SEC's exercise of investigatory authority is effectively bypassed. Through lack of motive or ignorance of

---

<sup>10/</sup> As to each subpoena, the SEC must meet Powell requirements. An agency subpoena to one party may meet the test; but a subpoena to a second party may fail. See U.S. v. Theodore, 479 F.2d 749 (4th Cir. 1973), in which the court found that an IRS summons to a third-party accountant of the target taxpayer was "too broad and too vague to be enforced". See also U.S. v. Harrington, 388 F.2d 520 (2d Cir. 1968), in which the court ordered enforcement of an IRS summons to a third party but only after finding the IRS summons was relevant and not over broad.

their rights, most non-target third parties will not resist compliance with agency subpoenas.<sup>11/</sup> As this Court has noted:

"True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though

---

<sup>11/</sup> A subpoena is issued because compulsion is necessary to coerce information a person will not voluntarily give. A target has an obvious interest in whether or not the agency investigation is lawful. If the agency has no legitimate purpose for investigating the target, or seeks information not relevant to that purpose, or otherwise acts unlawfully, then the target should not be subjected to the investigation and its adverse effects. However, a non-target third party does not share these same interests. A third party suffers only the inconvenience of producing documents or giving testimony as requested and no other adverse effects. Common sense tells us that the third party does not have the conviction of principle or other motivation required to undertake the costs of litigation inherent in litigating with the government. Additionally, because of the coercive form of the agency subpoena, a third party may not know that the agency subpoena is not enforceable unless first ordered by a court.

"improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command, or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation." Cudahy Packing Co. v. Holland, 315 U.S. 357, 363-64 (1942), quoted in U.S. v. Menker, 350 U.S. 179, 187 (1956).

The government is frank to admit that it seeks to avoid subpoena-enforcement actions required by Section 21(c) of the Exchange Act.<sup>12/</sup> The government argues that notice will result in an increase in the number of subpoena-enforcement actions and that this will turn SEC investigations into trial-like proceedings. As the Court of Appeals noted, subpoena-enforcement actions are summary proceedings and have priority on court

---

<sup>12/</sup> The government argues that a notice requirement constitutes the court's imposition of procedural rules on the executive branch in violation of FCC v. Schreiber, 381 U.S. 279 (1965). However, as stated in SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976):

calendars. The SEC's burden of showing the Powell requirements is not difficult, and in most cases may be done by affidavit. Once the showing is made, the subpoena is enforced unless a party affirmatively shows the SEC's conduct is unreasonable. Such "burden is not easily met". SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1056 (2d Cir. 1973).

The government raises a "parade of horrors" listing the ways targets with

---

11/ (Continued)

"Nor do we find anything to the contrary in FCC v. Schreiber . . . , heavily relied on by the Commission. Although the Court there counseled judicial restraint in interfering with the broad procedural powers delegated by Congress to the federal agencies, it nevertheless reaffirmed the responsibility of the courts to insure that administrative action is consistent with governing statutes and constitutional requirements." 533 F.2d at 11 (citations omitted). See also SEC v. Higashi, 359 F.2d 550 (9th Cir. 1966).

notice could obstruct agency investigations; however, "such speculation is insufficient". SEC v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976). See also Sells Engineering, supra. By requiring notice, the Court of Appeals has done no more than ensure the effectiveness of Sections 19(b), 20(a), and 22(b) of the Securities Act and Section 21 of the Exchange Act. If notice is not given to targets, then the SEC effectively avoids the Congressionally-mandated checks and balances for prevention of agency abuse.<sup>11/</sup>

---

<sup>11/</sup> The government argues that notice is not required because the target may assert a claim of abuse of process in any subsequent trial. The government cites Donaldson, supra, which, in turn, cites U.S. v. Blue, 384 U.S. 251 (1966). Blue is a criminal case. An SEC investigation may result in criminal or civil prosecution. While there may be the remedy of suppression of evidence for SEC abuse of authority in a criminal action, there clearly is no such remedy in a civil action. This Court has never



B. The Court of Appeals' Decision Is Not Contrary to Other Decisions.

The government argues that the Ninth Circuit decision conflicts with In Re Application of Cole, 237 F. Supp. 274 (S.D.N.Y. 1964), rev'd, 342 F.2d 5 (2d Cir. 1965), cert. denied, 381 U.S. 950 (1965) and Scarafiotti v. Shea, 456 F.2d 1052 (10th Cir. 1972). However, both cases are clearly distinguishable.<sup>13/</sup>

---

<sup>13/</sup> (Continued) held that evidence obtained by the government, even in violation of the Constitution, may be suppressed or excluded in civil proceedings. See U.S. v. Janis, 428 U.S. 433 (1976). Respondents are aware of no cases in which evidence obtained by abuse of process has, in fact, been suppressed.

<sup>14/</sup> The Court of Appeals' decision is not based upon constitutional provisions. It distinguishes decisions holding that there is no constitutional right to notice of third-party subpoenas. U.S. v. Schutterle, 586 F.2d 1201 (8th Cir. 1978) (due process), is thus inapplicable. Likewise, the prior Ninth Circuit decisions in Kelley v. United States, 536 F.2d 897 (1976) (Fourth and Fifth Amendments), and Howfield, Inc. v. United States, 409 F.2d 694 (1969) (unconstitutionality), are inapplicable.



In Cole, the taxpayer target sought notice of an IRS summons to a known third party, the taxpayer's bank. Because the third party was known, the target was able to force the IRS to initiate a subpoena-enforcement action, and the Second Circuit was in a position to determine that the target had no standing to intervene.<sup>11</sup> Unsurprisingly, the Second Circuit found that the target, "at least in the factual situation presented by this case", did not need notice of a known third-party summons. 342 F.2d 7. The Second Circuit specifically declined "to discuss" whether or not this Court's Reisman decision inferred a notice requirement. 342 F.2d 7. Additionally, because the target did not question the

---

<sup>11</sup> This Court's decision in Donaldson, supra, cited In Re Cole, supra, for the proposition that intervention in a subpoena-enforcement action is permissive and not a matter of right.

**Page Missing from  
Filming Copy**

**Page Missing from  
Filming Copy**

been met by the SEC. Unlike Cole, respondents have not had opportunity to question the SEC's showing of lawfulness of the third-party subpoena. Unlike the Second and Tenth Circuits, which did not decide the issue, the Ninth Circuit specifically determined that a target party is entitled to notice of third-party subpoenas.<sup>18/</sup>

C. Agency Investigations Are Not Grand Jury Investigations.

The government argues that, because no statute expressly provides for notice

---

<sup>18/</sup> The SEC points to the recent decision of the Southern District of New York in PepsiCo, Inc. v. SEC, 563 F. Supp. 828 (S.D.N.Y. 1983). Unlike the case at hand, plaintiff in that case had apparently received a subpoena and was not challenging the subpoena or the purposes of the investigation. The district court denied a temporary restraining order, citing U.S. v. Miller, 425 U.S. 435 (1976), and Hannah v. Larche, supra, which the Ninth Circuit in its decision distinguished, as well as Application of Cole, supra. The district court invited a prompt appeal to the Second Circuit.

of agency subpoenas, Congress did not intend such notice to be given. The government argues that Congress intended that SEC investigations proceed, like grand jury investigations, under a cloak of secrecy. The government ignores the basic proposition that in our system of free and open government, secrecy is the rare exception, and notice is the rule. The grand jury is allowed to operate in secret only because of institutional checks and balances, and only under express provision for secrecy in Rule 6(e) of the Federal Rules of Criminal Procedure.

The government's argument is inconsistent with the reasoning of this Court in the Sells Engineering decision. Although Congress has granted the SEC the authority to make investigations, Congress has clearly not granted the SEC

the "extraordinary powers" of the grand jury; Congress has granted to the SEC "usual, more limited avenues of investigation". Sells Engineering, supra, 77 L. Ed. 2d 752, 757-58.

Although Congress has granted the SEC authority to investigate, such grant does not imply the authority to operate in secret. This Court has properly held that agency investigations, like grand jury investigations, may be initiated without probable cause. Oklahoma Press, supra; Powell, supra. However, beyond this one common element, any analogy between the grand jury and the SEC fails.

This Court has carefully refrained from suggesting that agency investigations are identical to grand jury investigations. Hannah v. Larche, 363 U.S. 420 (1960); SEC v. ESM Government Securities, Inc., 645 F.2d 310 (5th Cir.

1981)<sup>12/</sup>. The contrasts are irreconcilable:

(1) The grand jury is of constitutional origin. In contrast, the SEC is solely a creature of statute.

(2) The grand jury is a body of private citizens serving for a limited duration. In contrast, the SEC is an ongoing agency of the executive branch.

(3) The grand jury operates "independently" of the prosecutor as a check and balance upon possible prosecutorial abuse. Sells Engineering, supra, 77 L. Ed. 2d 756. In contrast, the SEC operates without this division of function. SEC v. ESM, supra, 645 F.2d 312-13. The only check and balance upon the SEC is the subpoena-enforcement action of Section

---

<sup>12/</sup> Hannah v. Larche, supra, cited extensively by the government, involved the Commission on Human Rights. That Commission was a purely investigatory agency and, unlike the SEC, had been granted no prosecutorial function.

22(b) of the Securities Act and Section 21(c) of the Exchange Act.

(4) The grand jury performs the "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions". Sells Engineering, supra, 77 L. Ed. 2d 752, quoting Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972). In contrast:

"Although the SEC has a dual function, it is not an historic guardian of individual liberties. Instead, its two functions are investigation of possible illegal activities, and adjudication of alleged violations. . . . The SEC is not, like the grand jury, a protector of individuals against government prosecution. . . . There is no division of functions . . . between police and the grand jury. . . ." SEC v. ESM, 645 F.2d 312-13, citing Hannah v. Larche, 363 U.S. at 446-47.

(5) A grand jury investigation is strictly a criminal proceeding and cannot be utilized to investigate noncriminal violations. Sells Engineering, supra.



In contrast, an SEC investigation may inquire into possible civil or criminal violations, although the SEC has no power itself to bring a criminal action. Common experience indicates that few SEC investigations result in criminal prosecutions.

(6) A grand jury is expressly required to operate in secrecy. CrR 6(e); Sells Engineering, supra; U.S. v. Baggot, \_\_\_ U.S. \_\_\_, 77 L. Ed. 2d 785 (1983). In contrast, Congress has not expressly provided for SEC secrecy. The secrecy of the grand jury is mandatory. In contrast, the SEC claims discretion to operate either in secrecy or in public.

Secrecy is an investigative tool of the grand jury, not of the prosecutor. This Court has specifically held that the prosecutor will not be allowed "to manipulate the grand jury's powerful investigative tools" to investigate "where no

criminal prosecution seems likely" or to "elicit evidence for use in a civil case". Sells Engineering, supra, 77 L. Ed. 2d 757-58. If the SEC were allowed to make investigations using grand-jury-like secrecy, then the SEC would be more powerful than the grand jury itself. The SEC, operating with different purposes and without the checks and balances of the grand jury, would be allowed the discretion to conduct secret investigations into civil matters. If the government's argument is accepted, the SEC's powers would be "extraordinary" and, by contrast, the grand jury's would be "limited". The Sells decision, and its predecessors, would be turned upside down.<sup>10/</sup>

---

<sup>10/</sup> The government argues that the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3421 (1976), implies that Congress did not intend that agencies give notice to third-party subpoenas.

This Court has recognized that agency investigations are as much analogous to civil discovery as to grand jury proceedings:

---

<sup>10/</sup> (Continued) The government argues that because Congress has required notice in limited cases under that Act (namely, notice to customers of a third-party financial institution), Congress did not intend notice in all cases. This argument fails. The legislative history of the Act expressly indicates that it "incorporates and preserves existing legal requirements as prerequisites to the Commission's use of its subpoena authority", and particularly the requirement that subpoenas be "issued in conformity" with statutory standards. H.R. Rep. No. 1321, 96th Cong. 2d Sess. 2 (1980), reprinted (1980) U. S. Code Cong. & Admin. News, 3878. In addition to notice, Congress has required that notice be accompanied by a form of motion, motion paper and sworn statement, and detailed instructions on how to challenge the agency subpoena in court. 12 U.S.C. § 3405. Congress has further provided the remedies of civil penalties, actual and punitive damages, and attorney fees if the Act is violated. Id. § 3417. The Act thus implies that Congress intended that, with respect to financial records, citizens were entitled to remedies in addition to mere notice of a third-party subpoena. The legislative history also indicates that the SEC's need for third-party financial records is "unique" among non-bank regulatory agencies. H.R. Rep. No. 1321, supra, 3876.

"[An agency's] investigative function in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the courts in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations." Oklahoma Press, supra, 327 U.S. 216 (footnotes omitted).

This Court in Oklahoma Press specifically referred to the Federal Rules of Civil Procedure. Oklahoma Press, supra, 327 U.S. 216 n.55.

Analogy to civil discovery would not limit the SEC's ability to initiate investigations without "probable cause", nor limit the scope of the investigation. CR 26(b) of the Federal Rules of Civil Procedure; Oklahoma Press, supra. However, the SEC would be required to issue agency subpoenas accompanied by prior reasonable notice to target parties, unless special circumstances would necessitate a protective order. CR 16, 26(c), and 45. Any abuse by

target parties would be cause for sanctions by the court. CR 30(d), 37, and

45. As Professor Bloomenthal has stated:

"In an effort to rationalize its position, the Commission [SEC] has expressed concern that premature disclosure 'might allow prospective witnesses . . . to fabricate stories to correspond with testimony that has already been given by others'. It is submitted that such a position disregards laws pertaining to perjury and suborning perjury; is an affront to all members of the bar and disregards now longstanding experience with discovery in the courts.

"It is inevitable that in the course of time that legislation or judicial decision or more enlightened administrative attitude will change the Commission's outmoded stance with respect to discovery. The Commission's position can be explained only by the staff's desire not to be subject to the inconvenience and delay inherent in discovery procedures and by desire to obtain an adversarial advantage."

H. Bloomenthal, Vol. 3, Securities Law Series, Securities and Federal Corporate Law, § 1.12[4] at 1-50.14, quoting James W. Ruddy, Freedom of Information Act, Release No. 34 (Oct. 20, 1975), 8 S.E.C. Doc. 193 (Nov. 5, 1975).

Respondents do not argue that SEC

investigation should be subject to the Federal Rules of Civil Procedure. Respondents recognize that SEC investigations are not strictly analogous to either civil discovery or grand jury proceedings. Because SEC investigations are not adversary proceedings, investigations may proceed without cross-examination and without target-initiated depositions or document production.<sup>11/</sup> Because SEC investigations pursue mere suspicions, they should not be fully public proceedings so that innocent suspects are protected.

However, because SEC investigations are subject to express statute and because subpoena-enforcement actions are adversary proceedings available to both

---

<sup>11/</sup> As discussed previously, although SEC investigations are nonadjudicatory proceedings, subpoena-enforcement actions are adversary proceedings.

"parties subpoenaed and those affected by a disclosure", then notice to target parties of third-party subpoenas is essential. Reisman, supra, 375 U.S. at 445.<sup>11/</sup> The Congressionally-mandated subpoena-enforcement action is an adequate check and balance on the SEC's prosecutorial function and an adequate remedy at law if, and only if, the target party receives notice of third-party subpoenas. Notice helps protect the innocent suspect. Notice gives the court opportunity to fulfill its responsibility

---

<sup>11/</sup> Respondents recognize that in some cases the SEC may initiate a formal investigation without knowing the identity of all targets. Therefore, there can be no notice requirement until, as the investigation progresses, the target's identity reveals itself to the SEC. Once identified, the target should receive notice. The appropriate analogy exists in the notice requirement of the Federal Rules of Civil Procedure, e.g., notice must be "reasonable". CR 30(b), 31(a), 34(b), and 45.

as "protector of individuals against government prosecution". SEC v. ESM Government Securities, Inc., supra, 645 F.2d at 313.

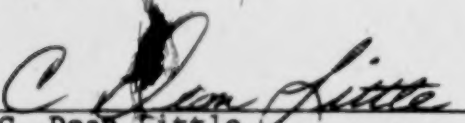
## III

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted on December 7, 1983.

LESOURD & PATTEN

  
C. Dean Little

Attorneys for Respondents  
Jerry T. O'Brien, Inc.;  
Jerry T. O'Brien;  
Pennaluna & Company, Inc.;  
and Benjamin Harrison



ADDENDUM

Courts of appeal of the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits have had occasion to hear appeals dealing with subpoena-enforcement actions. Appellate decisions include the following:

- SEC v. Howatt,  
525 F.2d 226 (1st Cir. 1975);  
U.S. v. Salter,  
432 F.2d 697 (1st Cir. 1970);  
SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047 (2d Cir. 1973);  
cert. denied, 415 U.S. 915 (1974);  
SEC v. Wall Street Transcript Corp.,  
422 F.2d 1371 (2d Cir. 1970);  
cert. denied, 398 U.S. 958;  
U.S. v. Harrington,  
388 F.2d 520 (2d Cir. 1968);  
SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118  
(3d Cir. 1981);  
U.S. v. Genser,  
582 F.2d 292 (3d Cir. 1978),  
cert. denied, 444 U.S. 928;  
U.S. v. McCarty,  
514 F.2d 368 (3d Cir. 1975);  
U.S. v. Theodore, 479 F.2d 749  
(4th Cir. 1973);  
SEC v. ESM Government Securities, Inc., 645 F.2d 310  
(5th Cir. 1981);  
U.S. v. Roundtree,  
420 F.2d 845 (5th Cir. 1969);

United States v. Wright Motor Co.,  
Inc., 536 F.2d 1090  
(5th Cir. 1976);  
CAB v. United Airlines, Inc.,  
542 F.2d 394 (7th Cir. 1976);  
U.S. v. National State Bank,  
454 F.2d 1249 (7th Cir. 1972);  
U.S. v. Matras,  
487 F.2d 1271 (8th Cir. 1973);  
Lynn v. Biderman,  
536 F.2d 820 (9th Cir. 1976)  
cert. denied, 429 U.S. 920;  
Chapman v. Maren Elwood College,  
225 F.2d 230 (9th Cir. 1955);  
Wild v. U.S.,  
362 F.2d 206 (9th Cir. 1966);  
Shasta Minerals & Chemical Co.  
v. SEC, 328 F.2d 285  
(10th Cir. 1964);  
Hellenic Lines, Ltd. v. Federal  
Marine Board, 295 F.2d 138  
(D.C. Cir. 1961);  
Montship Lines, Ltd. v. Federal  
Maritime Board, 295 F.2d 147  
(D.C. Cir. 1961);  
U.S. v. Fensterwald,  
553 F.2d 231 (D.C. Cir. 1977);  
See also Silver King Mines, Inc. v.  
Cohen, 261 F. Supp. 666  
(D.C. Utah 1966).

Courts in the First, Second, Third,  
 Fifth, Seventh, Ninth, Tenth, and Dis-  
 trict of Columbia Circuits have applied  
 decisions involving the IRS, notably  
Powell, supra, to the SEC and other agen-  
 cies.

APPENDIX

Sections 19(b) and 22(b) of the Securities Act of 1933, 15 U.S.C. 77s(b) and 77 v(b), and Sections 21(a)-(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a)-(c) are set forth in Appendix G of the Petition for Writ of Certiorari, pp. 31a-31b.

Section 20(a) of the Securities Act of 1933, 15 U.S.C. 77t(a), provides:

"Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts."

Office - Supreme Court, U.S.

FILED

DEC 10 1983

ALEXANDER L. STEVAS,  
CLERK

No. 83-751

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

---

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
PETITIONERS

v.

JERRY T. O'BRIEN, INC., ET. AL.,  
RESPONDENTS

---

BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

---

WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.

By: William D. Symmes

Thomas D. Cochran

Attorneys for Respondents  
Harry F. Magnuson and  
H.F. Magnuson & Company  
11th Floor, ONB Building  
Spokane, Washington 99201  
(509) 624-5265

QUESTION PRESENTED

Whether or not respondents herein were entitled to notice of the SEC administrative subpoenas issued to third parties under the specific circumstances of this case.

### PARTIES TO THE PROCEEDING

Petitioners (who were defendants and cross-defendants in the district court and appellees in the court of appeals) are the Securities and Exchange Commission and Jack H. Bookey, Lane B. Emory and George N. Prince, employees of the Commission's Seattle Regional Office.

Respondents are Jerry T. O'Brien, Inc., d/b/a Pennaluna & Co.; Jerry T. O'Brien; Benjamin A. Harrison; and Pennaluna & Co., Inc. (all of whom were plaintiffs in the district court and appellants in the court of appeals) and Harry F. Magnuson (hereinafter called "Magnuson" and H.F. Magnuson & Co. (hereinafter called "HFM & Co") (who were defendants and cross-plaintiffs in the district court and appellants in the court of appeals).

Respondent Magnuson is a certified public accountant who resides in Wallace, Idaho. Respondent HFM & Co is a certified public accounting firm with offices in Wallace, Coeur d'Alene and Kellogg, Idaho. The Wallace office is a sole proprietorship owned by Magnuson and the Kellogg and Coeur d'Alene offices are partnerships among Magnuson and other certified public accountants.

Respondent O'Brien is a resident of Kootenai County, Idaho and is the sole owner of J.T. O'Brien, Inc., d/b/a Pennaluna & Co., a registered broker-dealer. J.T. O'Brien, Inc. is a corporation incorporated under the laws of the State of Idaho and has its principal place of business in Wallace, Idaho. Respondent Harrison is an employee of O'Brien, Inc. and resides in Spokane, Washington. Respondent Pennaluna & Co.,

Inc., is a corporation and is incorporated under the laws of the State of Idaho and has its principal place of business in Spokane, Washington.



# TABLE OF CONTENTS

	<u>Page</u>
I. OPINIONS BELOW -----	2
II. JURISDICTION -----	2
III. STATUTORY PROVISIONS INVOLVED -----	3
IV. STATEMENT OF THE CASE -----	4
A. SEC Investigation -----	4
1. Nature of Suit ---	4
2. Issuance of FOI --	5
3. Scope of FOI -----	6
B. SEC Investigation Exceeded Scope of FOI -----	8
C. Litigation in District Court -----	14
D. Decision of Ninth Circuit Court of Appeals -----	21
V. SUMMARY OF ARGUMENT -----	22
VI. ARGUMENT - WHY PETITION SHOULD BE DENIED -----	27
A. The Holding of the Ninth Circuit is Consistent with Announced Congressional Provisions and Prior Supreme Court Case Law -----	27

B.	The Ninth Circuit Decision Does Not Present Conflicts with Decisions of Other Circuit Courts, But Rather is Con- sistent with the Same -----	37
C.	The "Parade of Horribles" Raised by the SEC amounts to mere Agency Convenience and should not form the Basis for Granting Certiorari in this Case -----	42
VII.	RELIEF REQUESTED -----	49

# TABLE OF AUTHORITY

## Table of Cases

	<u>Page</u>
<u>Coca-Cola Company v. FTC,</u> 475 F.2d 299 (5th Cir. 1973) -----	34
<u>In re Cole, 342 F.2d 5</u> (2nd Cir. 1965) -----	38, 39
<u>Donaldson v. United States, 400</u> U.S. 517 (1971) ---	36, 40
<u>Leedom v. Kyne, 358 U.S. 184</u> (1958) -----	30, 34
<u>Oklahoma Press Publishing Co.</u> <u>v. Walling, 327 U.S.</u> 186 (1946) -----	27
<u>PepsiCo., Inc. v. SEC,</u> 563 F. Supp. 828 (S.D. N.Y. 1983) -----	37, 40
<u>Reisman v. Caplin, 375</u> U.S. 440 (1964) -----	22, 25 26, 33, 40 42
<u>SEC v. ESM Government</u> <u>Securities, Inc., 645</u> F.2d 310 (5th Cir. 1981) ---	31

	<u>Page</u>
<u>SEC v. Wheeling-Pittsburgh</u>	
<u>Steel Corp., 648 F.2d</u>	
118 (3d Cir. 1981) -----	33
<u>Scarafiotti v. Shea, 456</u>	
<u>F.2d 1052 (10th Cir.</u>	
1972) -----	39, 40
<u>United States v. LaSalle</u>	
<u>Nat'l Bank, 437 U.S.</u>	
298 (1978) -----	26, 27
	30, 31
	35
<u>United States v. Powell,</u>	
379 U.S. 48 (1964) -----	22, 25
	27, 31,
	47, 48
<u>United States v. Sells</u>	
<u>Engineering, Inc.,</u>	
<u>U.S. _____, 77</u>	
L. E.2d 743 (1983) -----	27

# STATUTES

	<u>Page</u>
12 U.S.C. §3401 -----	38
15 U.S.C. §77s(a) -----	3, 4
15 U.S.C. §77s(b) -----	3, 22, 25
15 U.S.C. §77v(b) -----	3, 17, 22
15 U.S.C. §78u(b) -----	3, 22, 25
15 U.S.C. §78u(c) -----	3, 17, 22
28 U.S.C. §1254(1) -----	2
17 CFR §202.5(a) -----	3, 29

## OTHER AUTHORITY

[1980] U.S. Code Cong. & Admin. News 3877 -----	29
[1980] U.S. Code Cong. & Admin. News 3886-3889 -----	45

No. 83-751

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

---

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
PETITIONERS

v.

JERRY T. O'BRIEN, INC., ET. AL.,  
RESPONDENTS

---

BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

---

Respondents, Magnuson and HFM & Co,  
submit the following Brief in Opposition  
to the Petition for a Writ of Certiorari  
filed by the SEC seeking review of the  
opinion of the United States Court of

Appeals for the Ninth Circuit in this case.

I.

OPINIONS BELOW

The opinion of the court of appeals is reported at 704 F.2d 1065. The opinions of the district court are not reported. See Appendix to Petitioners' Brief, pp. 9a-16a, 17a-24a (where the opinions are set forth).

II

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1983. The SEC's petition for rehearing was denied on September 30, 1983. The SEC invokes jurisdiction of this Court under 28 U.S.C. §1254(1).

### III.

#### STATUTORY PROVISIONS INVOLVED

No constitutional provisions are involved in the instant case. The statutory provisions and regulations involved in this case are Section 19(a) of the Securities Act of 1933, 15 U.S.C. §77s(a); Section 19(b) of the Securities Act of 1933, 15 U.S.C. §77s(b); Section 22(b) of the Securities Act of 1933, 15 U.S.C. §77v(b); Section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(a); Section 21(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(b); Section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(c); and 17 CFR §202.5(a).



#### IV.

##### STATEMENT OF THE CASE

##### A. SEC Investigation.

##### 1. Nature of Suit.

This suit concerns the conduct of an investigation by the SEC and particularly its staff attorneys while acting outside the scope and beyond the authority defined in a Formal Order of Investigation (hereinafter called "FOI") styled "In the Matter of H.F. Magnuson & Company." Although the FOI alleges no violation of any securities law to have been committed by HFM & Co., it recites that the investigation was undertaken to ascertain whether Magnuson and certain others had violated various provisions of the Securities Act of 1933, 15 U.S.C. §77(a) et. seq., and the Securities Exchange Act of 1934, 15 U.S.C. §78(a) et. seq., or rules promulgated by the SEC thereunder, in certain specific

transactions involving six (6) mining companies. CR 1, Ex. A. (References are made to the record below.)

2. Issuance of FOI.

The SEC, through its Seattle Regional office, began the subject investigation of Magnuson in 1978. On September 3, 1980, the SEC entered an Order of Formal Investigation, CR 1, Ex. A, which granted limited subpoena power to certain SEC attorneys and staff.

Under the relevant statutes, the SEC is without authority to issue subpoenas as part of its investigation until a FOI is issued by the Commission itself. When a FOI is issued, the Commission then, consistent with the congressional scheme, authorizes named officers of the SEC to use subpoena power to "investigate certain transactions" being the subject of the investigation as framed by the FOI

itself. See Petitioners' Brief, p. 10 n.27.

3. Scope of FOI.

The FOI here is simple and straight forward as to those transactions and matters under investigation. The FOI states there is information which tends to show that Magnuson and named others bought and sold stock of a single named mining company on the basis of nonpublic or inside information. CR 1, Ex. Al ¶II B.

The FOI also states there is information which tends to show that Magnuson, being directly or indirectly the beneficial owner of more than ten percent of the common stock of four named companies and has made incomplete disclosures and filings concerning his ownership. CR 1, Ex. Al ¶II C.

The FOI states there is information which tends to show that Magnuson and

others have acquired, directly and indirectly, beneficial ownership of equity securities of four named companies and, as such, have failed to make disclosures and appropriate filings as required under Sections 13(d) and 13(g) of the 1934 Act. CR 1, Ex. A ¶II D.

Finally, the FOI states there is evidence which tends to show that Magnuson and other named persons and certain named corporations have offered to sell and have sold stock in three named companies in violation of the anti-fraud provisions of the Securities Act of 1933. CR 1, Ex. A. ¶II F, G, H.

Even though the FOI is limited, as set forth above, subpoenas have been issued by the SEC seeking documents relating to transactions in the securities of many mining companies other than those six named in the FOI, and the SEC has also issued subpoenas under the guise

of the FOI here seeking to investigate transactions beyond the time frame of the FOI and violations not even alleged in the FOI.

B. SEC Investigation Exceeded Scope of FOI.

Without informing Magnuson, or any of the other respondents herein or any other target of the investigation, that an investigation had been conducted or that the FOI had been issued by the Commission, certain SEC officers proceeded to subpoena various records and documents and take testimony from various witnesses. As of this date the SEC has issued at least sixty subpoenas duces tecum directed to various witnesses. CR 102, Ex. D-X.

Magnuson was not informed nor notified by the SEC of the existence of the investigation which started in 1978 until July 1981, ten months after

issuance of the FOI, when he and HFM & Co. received various subpoenas duces tecum calling for production of a broad category of records. Magnuson and HFM & Co. notified the SEC that he would not voluntarily comply with the subpoenas because the subpoenas duces tecum sought documents not authorized by the FOI and, further, because it became apparent that the SEC was engaged in nothing more than a fishing expedition which had been ongoing for more than three (3) years. In this connection, it is interesting to note that the SEC never asked to talk with HFM or any other target about any matter under investigation and it still has not done so.

The conduct of the investigation by the SEC, its attorneys and staff, as evidenced by the various issued subpoenas, has been made without authority of the FOI and with lack of good faith.

Copies of the FOI, a nonpublic document, were furnished or shown by the SEC to numerous persons including clients of and persons with whom Magnuson and HFM & Co. do business, despite the fact that the investigation was to be conducted on private, nonpublic and confidential basis under the SEC's rules and terms of the FOI itself and despite the fact that no wrongdoing is alleged, in the FOI, to have been committed by HFM & Co.

The SEC leaked the fact that the nonpublic investigation was being conducted and the nature of the investigation by furnishing or allowing review of the nonpublic FOI by others in a manner calculated to injure, defame and cause embarrassment to Magnuson. As a result of these activities by the SEC, a news article appeared in the Kellogg (Idaho) Evening News on July 22, 1981 revealing

that the SEC was investigating Magnuson. CR 1, Ex. K. The news article described the FOI in detail and further went on to discuss the matters under investigation. Petitioner Bookey of the SEC is quoted as saying in the article "We don't comment on an investigation in progress", thus confirming the investigation's existence. Despite the obvious leak of a nonpublic investigation by the SEC, the SEC has refused to disclose the names of the persons to whom the FOI was furnished or shown or to furnish Magnuson the results of its investigation of the leak. Similar articles also appeared in the Spokane, Washington newspapers on July 23, 1981.

On September 4, 1981, George N. Prince, an attorney for the SEC, without permission examined certain personal records of respondent Harrison without the knowledge or consent of Harrison.



In conducting the investigation, the SEC issued several subpoenas to respondent O'Brien. O'Brien was not named in the FOI as being under investigation, i.e., a "target," and thus voluntarily complied with the subpoenas after his counsel had been informed by the SEC that O'Brien was not a target of the investigation. CR 2. In May of 1981, the SEC conducted an audit of O'Brien's records under the guise of the FOI in question lasting a total of four days and reviewed certain trading account ledgers and other records relating to various mining securities transactions of O'Brien, many not related to the companies nor trading alleged in the FOI to be under investigation. Subsequent to the extensive production by O'Brien to the SEC and the multiple reviews of documents maintained at O'Brien, Inc.'s office by Prince and other SEC personnel, counsel for O'Brien

was belatedly informed by the SEC in August 1981, after having complied with a half dozen subpoenas over six months, that in fact O'Brien was a target of the investigation. CR 2.

Illustrative of the SEC's invalid expansion of the use of subpoenas to acquire records and information beyond the scope of the FOI are some of the third party subpoenas issued. CR 102, Ex. D-X. For example, the SEC sought and acquired from O'Brien, Inc. documents concerning securities transactions occurring many months or years after the date of the FOI. CR 102, Ex. D. It further sought and acquired documents relating to transactions in a vast number of companies beyond the limited transactions of the six companies under investigation. CR 102, Ex. D. See also, CR 102, Exs. E-X. Virtually all of the third party subpoenas issued by the SEC

required production of documents unrelated either in time or scope to the FOI.

A telling admission of the broad invalid expansion of the FOI is the SEC's current investigation of transactions of shares in four mining companies which were the target of a takeover bid by Sunshine Mining Company. CR 102, Exs. U-X. The takeover attempt did not even commence until six months after the date of the FOI. Moreover, the SEC has sought and obtained documents concerning transactions in companies unrelated to the FOI which transactions occurred months if not years after the period of time under investigation. See, e.g., CR 102, Ex. E-X.

C. Litigation in District Court.

The action below was initiated on September 9, 1981, by O'Brien, Benjamin

A. Harrison ("Harrison") and Pennaluna & Company, Inc. ("Pennaluna"), as plaintiffs, against the SEC, Magnuson, and HFM & Co as defendants in the United States District Court for the Eastern District of Washington. CR 1. By the suit, the plaintiffs sought legal relief by way of damages and also sought to enjoin the SEC from violation of plaintiffs' statutory rights, i.e., from issuing subpoenas to investigate events and persons outside of the scope of the FOI issued by the Commission; and from acting in bad faith in the conduct of the investigation.

The O'Brien respondents have additionally sought to enjoin HFM & Co from production of certain of O'Brien's documents in its possession as accountant for O'Brien pursuant to an SEC subpoena served upon HFM & Co for production of such documents. CR 1.

Thereafter, on September 25, 1981, CR 26, the Magnuson respondents filed a cross claim and third party complaint against the SEC and a third party complaint against three employees of the SEC, seeking equitable and legal relief against the SEC and its employees. Magnuson similarly sought to restrain the SEC from acting beyond the scope of its statutory authority by investigating matters and issuing process and subpoenas beyond the scope of the FOI and, thus, without authority.

Subsequently, the SEC moved to dismiss the claims of all respondents. CR 43. Following a hearing, the district court entered its opinion and order dated January 20, 1982, CR 61, granting the SEC's motion to dismiss the equitable claims of the respondents, but denying its motion to dismiss their respective legal claims.

The district court reasoned that because there were outstanding SEC subpoenas to respondents O'Brien and Magnuson, the respondents would have the opportunity to object to the excessively broad and otherwise unauthorized subpoenas issued by SEC staff attorneys at a subpoena enforcement hearing which would presumably be brought promptly by the SEC pursuant to Section 22(b) of the Securities Act of 1933, 15 U.S.C. 77v(b), and Section 21(c) of the Exchange Act of 1934, 15 U.S.C. 78u(c). Thus, the district court concluded that the respondents Magnuson and O'Brien would have an adequate remedy at law at such a hearing.

However, the SEC brought no subpoena enforcement action against respondents O'Brien or Magnuson. Instead it continued after the January 20, 1982, order to issue an untold number of administrative subpoenas to third persons and, in

so doing, side-stepped the need to bring a subpoena enforcement action against respondents and, thus, thwarted respondents so-called "adequate remedy at law." Indeed, the district court noted at a subsequent hearing on March 25, 1982, that the SEC had "waged an aggressive investigation, issuing numerous subpoenas" to third parties since the last hearing on January 20, 1982. CR 104. In this connection, it should be noted that Magnuson alleged in district court and argued to the Ninth Circuit, and the SEC did not deny, that the SEC was issuing many third party subpoenas and subpoenas duces tecum not only beyond the scope of their awareness but beyond the scope of the FOI.

Consequently, Magnuson and O'Brien urged the district court to require the SEC to give respondents notice of third party subpoenas so that the SEC could not

"end-run" a subpoena enforcement hearing and so that respondents could protect their rights in the absence of such a hearing. CR 68.

On March 25, 1982, the district court declined to order notice. CR 104. But in so doing, the court stated:

"The natural query at this junction is what protections exist for the ostensible 'target' of an investigation if he is not aware of process outstanding against third parties. Plaintiffs suggest that the only effective remedy would be to require notice to those under investigation whenever such process is issued. The argument is not without appeal." CR 104.

The district court also expressed concern with its ruling:

". . . I cannot say with certainty that this heretofore unresolved question could not be determined otherwise on appeal. The issue is intriguing, eminently arguable, and certainly substantial in the sense that the questions raised should be authoritatively determined on appeal. CR 104.

Consequently, the district court granted a stay of fourteen (14) days



enjoining the SEC from enforcing any outstanding process to enable the question of third party notice to be brought to the immediate attention of the Ninth Circuit. CR 104.

Of concern to the district court and respondents was that, in the case of third party subpoenas, the third party had no incentive either to inform the target of the outstanding subpoena or to challenge its validity in district court. If the subpoenaed third party was a broker and thus regulated by and dependent upon cooperation with the SEC for his livelihood, he cannot safely afford to question the validity of the subpoena or the scope of the information or documents sought thereby. Therefore, it is easily seen how a SEC investigation, relying primarily on third party subpoenas, can evade judicial scrutiny even

when the subpoenas admittedly exceed the scope authorized by the FOI.

A timely appeal was subsequently taken by the Magnuson respondents.  
CR 105.

D. Decision of Ninth Circuit Court of Appeals.

The Court of Appeals held that the targets of the investigation here were entitled to have the investigation conducted in good faith and in conformity with their legal rights. Faced with the record before it and to assure maintenance of respondents' legal rights, the court reasoned that notice to the targets of the investigation of third party subpoenas was essential in order for the targets to have the opportunity to protect their rights. It concluded that the targets of the SEC investigation should be given notice by the SEC of subpoenas directed to third parties

arising out of its investigation of the respondents here.

The decision of the Court of Appeals is based on this Court's decisions in U.S. v. Powell, 379 U.S. 49 (1964), and Reisman v. Caplin, 375 U.S. 440 (1964), and effectuates the statutory process authored in Sections 19(b), and 22(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), and 77v(b), in Sections 21(b), (c) of the Exchange Act of 1934, U.S.C. 78u(b), 78u(c), as well as the Commission's own regulations issued thereunder.

V.

#### SUMMARY OF ARGUMENT

The Magnuson respondents do not argue that the SEC lacks the right to investigate potential securities law violations or that the SEC lacked probable cause to issue the FOI. The Magnuson respondents do not object to

legitimate subpoenas to advance an agency instituted investigation. Nor do they complain of administrative depositions of third persons so long as they are conducted within the scope of the FOI.

On the other hand, where an agency is conducting an ongoing investigation, aspects of which are beyond the scope of FOI and therefore are without Congressional authority, and where the agency obtained information and documents through subpoenas to third parties without the opportunity for judicial review at an enforcement hearing, the Magnuson respondents sought notice of third party process so that they could address unauthorized agency conduct in the appropriate forum.

The Magnuson respondents do not seek an order of the court that they had the right to be free from investigation by the SEC. Nor do they seek an order

detailing who the SEC can investigate, how they can investigate, nor when or why the SEC can investigate them. What the Magnuson respondents sought, however, was that they were being investigated consistent with statutory authority and agency good faith.

The sole question presented to this Court is thus whether or not a target of a SEC investigation should be given notice of administrative subpoenas issued to third parties.

The holding of the Ninth Circuit in this case answered the posed question affirmatively. The ruling is consistent with congressional authority and prior case law of this Court.

As for Congress, it limited use of subpoena power by the SEC. It legislated that subpoena authority is limited to the scope and extent of the FOI issued by the Commission. Subpoenas may only be used

to compel testimony and production of records for those certain transactions under investigation as defined by the FOI. 15 U.S.C. §77s(b), 78u(b). Many of the subpoenas issued in this case by agency staff went well beyond the FOI and thus have exceeded Congressional mandate.

This Court has often stated that members of the public have a right to be investigated by federal agencies only within their respective authority. Moreover this Court has stated that targets of agency investigation may have certain remedies in the event of abusive process issued to third parties and may attack the same on appropriate grounds. Reisman v. Caplin, 375 U.S. 440 (1964). This Court has also held that members of the public have a right not to have agency process in an investigation used otherwise than in good faith. United States v. Powell, 379 U.S. 48 (1964).

The decision of the Court of Appeals is based on statute and upon the foregoing decisions of this Court. It creates no new rights or remedies. Rather it merely provides a mechanism whereby the target of an SEC investigation will be provided notice of third party process so that he may apply to the appropriate forum for whatever relief he may be entitled.

By providing a mechanism of knowledge, the Court of Appeals does not burden agency investigations nor question the investigations' legitimacy. The notice requirement merely affords targets an opportunity to question the process on any appropriate grounds. Reisman v. Caplin, supra. Therefore, the petition for a writ of certiorari should be denied.

VI.

ARGUMENT - WHY PETITION SHOULD BE DENIED

A. The Holding of the Ninth Circuit is Consistent with Announced Congressional Intent and Prior Supreme Court Case Law.

Congress has granted the SEC "limited authority" to undertake investigations. United States v. Sells Engineering, Inc., \_\_\_ U.S. \_\_\_, 77 L. Ed.2d 743 (1983). The SEC may exercise its authority only in compliance with statutory standards and judicial decisions. United States v. Powell, supra.

In this connection, Congress has given the SEC authorization to issue agency subpoenas to further its investigatory function. However, an SEC administrative subpoena may be issued only as authorized by law. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). Since Congress withheld from the



SEC the authority to enforce its own subpoenas, the SEC must seek judicial enforcement.

The courts will not enforce SEC subpoenas without a showing by the agency that it is seeking information in documents within statutory limits. This Court stated in Powell:

"Reading the statute as we do . . . [the agency] must show (1) that the investigation will be conducted pursuant to a legitimate purpose, (2) that the inquiry may be relevant to the purpose, . . . (4) that the administrative steps required . . . have been followed." 379 U.S. at 57-58.

One of the requirements that the agency must follow is to limit the investigation to those matters and transactions identified in the FOI. Congress has specifically announced that the power of the SEC to issue subpoenas under a FOI is limited as follows:

Subpoenas are enforceable only to the extent that they seek

information which is reasonably relevant to matters within the scope of the Formal Order of Investigation. Should the staff uncover information indicating the advisability of pursuing possible violations not embodied within the scope of the Formal Order, it must be returned to the Commission and seek an amendment to the order. [H.R. Rep. No. 1321, 96th Cong., 2d Sess. 2 (1980) reprinted in [1980] U.S. Code Cong. & Admin. News 3877 n.2 (Emphasis added).]

In fact, the SEC admits the same in its petition stating "Commission attorneys may not issue subpoenas until the Commissioner's five presidentially-appointed members first determine that subpoena power should be authorized to investigate certain transactions (17 CFR 202.5)." Petitioner's Brief, p. 10, n. 27. (Emphasis added.)

Thus, Congress, having addressed the issue of the scope of SEC subpoena power, has created and defined rights in members of the public as to the manner by which the SEC may investigate them by the use of subpoenas.

This Court has often held that the federal courts have the power to prevent the deprivation of a congressionally granted right. See, e.g., Leedom v. Kyne, 358 U.S. 184 (1958). In Leedom v. Kyne, supra, it is noted "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." Id. at 190.

This Court has often held that members of the public have a right that federal agency subpoenas must be issued in good faith and not in abuse of their statutory authority. United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978).

Agency process is not self-executing. Rather enforcement, by statute, is left to the federal courts. The reason is clear:

[The SEC] is not an historic guardian of individual liberties. Instead, its two functions are investigation of possible illegal

activities, and adjudication of alleged violations. SEC v. ESM Government Securities, Inc., 645 F.2d 310, 312-313 (5th Cir. 1981).

The recipients of and those affected by agency subpoenas, i.e., the targets of an agency investigation, may seek redress against agency process on any appropriate ground Reisman v. Caplin, 375 U.S. 440 (1964). This Court has never provided a complete list of the appropriate grounds for challenge. However, this Court has held that an appropriate ground is where process is issued contrary to and beyond statutory authority and in lack of good faith thus showing agency abuse of process. United States v. Powell, 379 U.S. 48 (1964); United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978).

From time to time, this Court has given examples of elements of a good-faith exercise of agency subpoena power. In United States v. Powell, 379 U.S. 48 (1964), this Court listed certain

elements of a good-faith exercise of issuances of subpoenas as quoted above.

The Magnuson respondents made a showing before the courts below that certain subpoenas had been issued by the SEC to third parties seeking documents and information beyond the scope of the FOI and, as such, have exceeded the SEC's statutory authority in violation of the Magnuson respondents' rights. In fact, the district court judge below noted that, "the SEC has waged an aggressive investigation, issuing numerous subpoenas in the Spokane area to various mining companies and brokers. Plaintiffs contend that the subject matter sought under these subpoenas is in substance the same as that sought under the subpoenas issued directly to the parties in this action. It is argued that the SEC is attempting an 'end run' around the procedural safeguards set forth in

Powell." Order of March 25, 1983.

Appendix to Petition, p. 10a.

In the usual case, the recipient of an administrative subpoena may not bring an independent action seeking to quash the subpoena or test the legality of the underlying investigation, and can only make such a motion in response to a subpoena enforcement brought by the agency issuing the subpoena. See, e.g., Reisman v. Caplin, 375 U.S. 440 (1964). Similarly, there are many circumstances in which those subjected to an agency investigation must await final agency action before challenging the conduct of the investigation or other agency proceedings. See, e.g., SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118 (3d Cir. 1981). The rationale in such instances, is that normally the private party has an adequate remedy of law to challenge the action in a subsequent

subpoena enforcement proceedings or in an appeal from a final agency decision. This is clearly not the case here in the instance of third party process.

Courts have consistently recognized that equitable relief is required where an agency exercises its authority in excess of its statutory authority. Coca-Cola Company v. FTC, 475 F.2d 299 (5th Cir. 1973); Leedom v. Kyne, 358 U.S. 184 (1958).

In the case of a third party subpoena, how can the investigated person's rights be protected if he or she has no notice of the third party subpoena?

If third party agency subpoenas were being issued unknown to Magnuson and the third party voluntarily complied with the same, no ability to guarantee or enforce Magnuson's rights exists in the absence of knowledge of the process. Magnuson has no ability to challenge the excesses

of an outstanding subpoena directed to others concerning unrelated activities occurring in a time frame postdating the FOI in the absence of knowledge.

This Court has never furnished a complete listing of situations demonstrating agency abuse of process. United States v. LaSalle Nat'l Bank, supra. This Court has noted that "[f]uture cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." Id. at 318 n.20.

In the instant case, the Court of Appeals did not involve itself in agency investigations. The Court set forth no ruling affecting who, what, why, when or how members of the public may be investigated by the SEC. The Ninth Circuit created no new rights in the Magnuson respondents. Rather, its decision provided merely a mechanism for targets



of an investigation to be given notice of third party subpoenas. By stating that notice of third party process should be given to targets of an SEC investigation, the Ninth Circuit provided a mechanism whereby notified targets can thereafter seek redress of any rights and remedies they already have in an appropriate forum.

This mechanism implements what the Supreme Court and Congress have already established; namely, the right of a target to seek judicial review of agency subpoenas. Having the potential right to attack abuses and lack of good faith, the Court of Appeals merely ensured that the rights would not vanish through lack of knowledge. In the absence of notice, this right becomes meaningless. This case involves agency compliance with the law as it already exists. The decision of the Ninth Circuit was inevitable. The

result of the notice requirement in public confidence in knowing that the agency is following its statutory authority. Notwithstanding the SEC's argument to the contrary, in a case such as this where the targets are clearly identified, there can be no harm to the agency or any undue burden to an agency investigation by the mere fact of giving the target notice of third party process.

B. The Ninth Circuit Decision Does Not Present Conflicts with Decisions of Other Circuit Courts, But Rather is Consistent with the Same.

The decision by the Ninth Circuit below does not conflict with decisions of other circuit courts of appeal, but is consistent with the same. Any seeming differences in such cases can be fairly accounted for on the basis of important factual variations from those involved here.

The SEC argues that the decision in In re Cole, 342 F.2d 5 (2d Cir. 1965) is in conflict with the decision here. However, no conflict exists. In re Cole, a taxpayer target sought notice of an IRS summons to a known third party, the taxpayer's bank. Because the third party was known, the target was able to force the IRS to initiate a subpoena enforcement action. At the subpoena enforcement action, the court held since the taxpayer did not own the books or records belonging to the third party being subpoenaed that he had no standing to object to the summons. The decision was limited to the factual circumstances before it. Moreover, the decision in In re Cole has been statutorily changed by the enactment of the Right to Financial Privacy Act of 1978, 12 U.S.C. §3401 et seq under which the SEC must give notice to targets of subpoenas of financial institution

account records of the target's transactions. Therefore Cole has no longer any validity.

The Commission also cites the case of Scarafiotti v. Shea, 456 F.2d 1052 (10th Cir. 1972) as being in conflict with the decision of the Ninth Circuit. However, no conflict exists. In Scarafiotti, the target taxpayer requested notice of any interview of any third party. This is not the thrust in this case where notice is only sought of subpoenas issued to unknown third parties under the guise of statutory authority. Moreover, in Scarafiotti, the taxpayer sought mandamus to issue compelling notice. There, the court felt that mandamus could not issue based upon the facts of that case. Moreover, the respondents therein did not assert as here the abusive nature of the agency process. Additionally, Congress has,

after the decision in Scarafiotti, provided for notice of IRS summonses issued to third parties. Therefore, the cases has no further precedential value.

The Commission is correct when it cites that Donaldson v. United States, 400 U.S. 517 (1971), did not require notice. The court in Donaldson never addressed the issue. The court in Donaldson, as it was concerned in Reisman v. Caplin, 375 U.S. 440 (1964), was concerned with the good faith of agency actions. The court there was only concerned with the rights that one had when being investigated and left it to other cases in appropriate factual settings to develop how to effectuate the rights to be investigated consistent with agency statutory authority and in good faith.

The reliance of the Commission on PepsiCo., Inc. v. SEC, 563 F. Supp. 828

(S.D. N.Y. 1983) as showing a conflict in the circuit is misplaced. Not only does that involve a district court ruling and not a decision of the Court of Appeals of the Second Circuit, but moreover, the facts upon which it was based are quite different. There, unlike here, the plaintiff had apparently been served with a subpoena but was not challenging the scope of the subpoena or the purpose of the investigation. Additionally, the plaintiff sought a restraining order barring the Commission from issuing third party subpoenas without first giving notice. Unlike here, there had not been a showing of the SEC overstepping its statutory bounds or abuses in the conduct of the investigation.

C. The "Parade of Horribles"  
Raised by the SEC amounts to mere Agency  
Convenience and should not form the Basis  
for Granting Certiorari in this Case.

By requiring notice the Court of Appeals merely insured compliance with Sections 19(b), and 22(b) of the Securities Act and Section 21(b) and 21(c) of the Exchange Act, and followed the lead taken in Powell and Reisman. If no notice is given to targets, the SEC evades the congressionally-mandated safeguards for prevention of agency abuse through judicial review of subpoenas at an enforcement hearing.

Nevertheless, the SEC raises a "parade of horrors" listing far-fetched ways by which targets with notice could obstruct agency investigations. Such speculation is insufficient in the absence of proof.

At the same time the SEC overlooks that the Ninth Circuit decision does not involve the Court in the general supervision of agency investigations. The decision does not involve who or what or when or why persons may be investigated. The decision is strictly limited to disclosing third party process. Such disclosure does not divulge confidential witness statements nor documents. As stated above, the decision below creates no new rights or remedies.

The SEC's petition makes much ado about the impact that giving notice of third party subpoenas will have on its investigation. Boiled down to simplistic terms, the SEC, for mere "agency convenience," does not want to give notice.

The Commission specifically argues that the decision of the Ninth Circuit "has seriously disrupted the Commission's law enforcement investigations,"



Petition, p. 12; that "the decision below is almost certain to impair the operation of these programs, as well as the SEC's efforts to discharge the statutory mandate" Id.; that notice will "substantially increase the opportunities for the destruction of documents, intimidation of witnesses, tailoring of testimony, fabrication of defenses, and the transfer or dissipation of assets," and "In some cases, targets may threaten witnesses with physical or economic retaliations," and also delay investigations." Id. at p. 14. All as a result, "the Commission and other law enforcement agencies 'would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable.'" Id. at p. 15.

The SEC's "parade of horrors" is nothing novel. The same litany was urged

by the Chairman of the Securities and Exchange Commission before Congress in an unsuccessful attempt to exempt the SEC from the disclosure provisions of the Right to Financial Privacy Act of 1978, 12 USC §3401 et seq. See H.R. Rep. N. 1321, 96th Cong., 2d Sess. 2 (1980) represented in [1980] U.S. Code Cong. & Admin., News 3886-3889.

Thus, Congress has already considered the SEC's parade of horrors and on balance Congress concluded that notice to customers of financial institutions of agency subpoenas outweighs the claims of the Commission.

Also, in an investigation where a target accidentally learns of the third party process by some other means, the parade of horrors is no less present.

Moreover, there has never been any contention in this case that any of the

parade of horrors has or is likely to happen.

Apparently not liking what Congress and the Supreme Court have previously concluded as to the nature of a target's rights, all that the SEC is really saying is "let's not make it easy for investigated persons to attempt to effectuate their rights and potential remedies, therefore let's not tell them." Thus, the SEC's action does not involve anything other than administrative convenience and a disregard of the rights previously conferred on the public by Congress and this Court has said exist.

In this case, the SEC has never disputed that it is seeking to investigate matters other than those in the FOI by use of subpoenas issued under the guise of the FOI. Congress has stated it cannot do so without seeking an amendment to the FOI which the SEC has failed to

do. It is up to the federal courts to fashion the appropriate mechanisms to ensure that a person's rights will not be abused. To effectively control abuse of process by the SEC, the target of the investigation must be able to knowingly exercise his rights.

Therefore, denying the target notice of agency process issued to third parties when faced with the showing made by respondents to the courts below of the breach of statutory authority by the SEC in conducting the investigation in this instance, necessarily denies the targets of the ability to assert their rights to be investigated consistent with the good faith standards set forth by this Court in United States v. Powell, 379 U.S. (1964). The court below thus correctly concluded that notice should be given.

The SEC contends that no disclosure should be made because they allege that

their actions are presumed to be valid. However, the presumed validity of an agency investigation comes into play only when one is in the appropriate forum trying to test the legitimacy of agency process under the Powell standards. There, as the Magnuson respondents recognize, the person opposing the process has a heavy burden of proving abusive process. However, one has no opportunity to test the legitimacy of process in the absence of knowledge of the same. In the absence of notice members of the public have no ability to test agency good faith and to insure that the agency is operating within its statutory framework. Disclosure to targets of third party process does not stop investigations. In fact, the investigation in this case has not been

stopped ever until this date. But without notice, the public's rights to have an investigation properly conducted are negated. This Court and Congress has already established how agency investigations are to be conducted. The Ninth Circuit did not add or detract from this reasoning. It created no new rights nor remedies. It only provided a mechanism whereby a target or member of the public will not lose a potential right or remedy in force of lack of knowledge.

#### VII.

#### RELIEF REQUESTED

The petition for certiorari should be denied.

DATED: December 7, 1983

Respectfully submitted,

WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.

BY S/ WDS  
WILLIAM D. SYMMES

BY S/ TDC  
THOMAS D. COCHRAN

Attorneys for Respondents  
Harry F. Magnuson and  
H.F. Magnuson & Company  
11th Floor, ONB Building  
Spokane, Washington 99201  
(509) 624-5265

No. 83-751

Office - Supreme Court, U.S.

FILED

FEB 23 1984

ALEXANDER L. STEVAS.

CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1983

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
PETITIONERS

v.

JERRY T. O'BRIEN, INC., ET AL.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**BRIEF FOR THE PETITIONERS**

REX E. LEE

*Solicitor General*

KENNETH S. GELLER

*Deputy Solicitor General*

SAMUEL A. ALITO, JR.

*Assistant to the Solicitor General*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 633-2217*

DANIEL L. GOELZER  
*General Counsel*

PAUL GONSON  
*Solicitor*

LINDA D. FIENBERG  
*Associate General Counsel*

LARRY R. LAVOIE  
*Assistant General Counsel*

HARRY J. WEISS  
*Special Trial Counsel*

RUTH E. EISENBERG  
*Special Counsel*

ELIZABETH A. SPURLOCK  
*Attorney*

*Securities and Exchange Commission*  
*Washington, D.C. 20549*



### **QUESTION PRESENTED**

Whether the Securities and Exchange Commission must notify "targets" of its non-public investigations when subpoenas are issued to third parties.

**PARTIES TO THE PROCEEDING**

Petitioners (who were defendants and cross-defendants in the district court and appellees in the court of appeals) are the Securities and Exchange Commission and three employees of the Commission's Seattle Regional Office, Jack H. Bookey, Lane B. Emory, and George N. Prince.

Respondents are Jerry T. O'Brien, Inc., d/b/a Pennaluna & Co.; Jerry T. O'Brien; Benjamin A. Harrison; and Pennaluna & Co., Inc. (all of whom were plaintiffs in the district court and appellants in the court of appeals) and Harry F. Magnuson and H. F. Magnuson & Co. (who were defendants and cross-plaintiffs in the district court and appellants in the court of appeals).

## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statutory provisions involved .....	2
Statement .....	2
Summary of argument .....	8
 Argument:	
The Securities and Exchange Commission is not required to notify "targets" of its investigations that subpoenas have been issued to third parties .....	11
A. The court of appeals' notice procedure is not required by the Constitution, by any statute or rule, or by any decision of this Court .....	11
1. The Constitution does not require the Commission to provide "targets" of its investigations with notice of subpoenas issued to other persons .....	13
2. The Securities Act and the Securities Exchange Act authorize the Commission to investigate privately without providing "targets" with notice of subpoenas issued to other persons .....	16
3. This Court's decision in <i>United States v. Powell</i> does not confer a procedural right to notice upon "targets" of agency investigations .....	23
B. The court of appeals' notice requirement will cause serious problems for law enforcement that Congress could not have intended .....	27
Conclusion .....	35
Addendum .....	1a

# IV

## TABLE OF AUTHORITIES

Cases:	Page
<i>Alaska Teamster-Employer Pension Trust v. Donovan</i> , No. C-83-4636-RPA (N.D. Cal. filed Oct. 3, 1983) .....	34
<i>Andrus v. Allard</i> , 444 U.S. 51 .....	21
<i>Archer v. United States</i> , 393 F.2d 124 .....	28
<i>Atlantic Richfield Co. v. FTC</i> , 546 F.2d 646.....	30
<i>Baltimore Gas &amp; Electric Co. v. NRDC</i> , No. 82-524 (June 6, 1983) .....	23
<i>Bread Political Action Committee v. FEC</i> , 455 U.S. 577 .....	16
<i>Cole, In re</i> , 342 F.2d 5, cert. denied, 381 U.S. 950....	26
<i>Commercial Capital Corp. v. SEC</i> , 360 F.2d 856....	28
<i>Consolidated Mines v. SEC</i> , 97 F.2d 704 .....	29
<i>Couch v. United States</i> , 409 U.S. 322 .....	14
<i>Dawson Chemical Co. v. Rohm &amp; Haas Co.</i> , 448 U.S. 176 .....	23
<i>Donaldson v. United States</i> , 400 U.S. 517 .....	6, 8, 14, 15, 25, 30, 31
<i>Douglas Oil Co. v. Petrol Stops Northwest</i> , 441 U.S. 211 .....	27, 28-29
<i>EEOC, In re</i> , 709 F.2d 392 .....	26
<i>E.I. du Pont de Nemours &amp; Co. v. Train</i> , 430 U.S. 112 .....	23
<i>Ernst &amp; Ernst v. Hochfelder</i> , 425 U.S. 185.....	16
<i>FBI v. Abramson</i> , 456 U.S. 615 .....	28
<i>FCC v. Pottsville Broadcasting Co.</i> , 309 U.S. 134....	18
<i>FCC v. Schreiber</i> , 381 U.S. 279 .....	18, 24
<i>FMC v. Port of Seattle</i> , 521 F.2d 431 .....	19
<i>FTC v. Standard Oil Co.</i> , 449 U.S. 232 .....	31
<i>Fisher v. United States</i> , 425 U.S. 391 .....	8, 14
<i>FSLIC v. First National Development Corp.</i> , 497 F. Supp. 724 .....	30
<i>Hannah v. Larche</i> , 363 U.S. 420 .....	8, 11, 13, 14, 24, 29, 31, 34
<i>Illinois v. Abbott &amp; Associates, Inc.</i> , No. 81-1114 (Mar. 29, 1983) .....	28, 34
<i>INS v. Phinpathya</i> , No. 82-91 (Jan. 10, 1984)....	16, 17
<i>Kahn v. Phillips</i> , No. 84-0346 (D.D.C. filed Feb. 1, 1984) .....	34

## Cases—Continued:

	Page
<i>Kelley v. United States</i> , 536 F.2d 897, cert. denied, 429 U.S. 1047 .....	26
<i>Magnuson v. SEC</i> , No. 82-2042 (D. Idaho July 27, 1982) .....	5
<i>Middlesex County Sewerage Authority v. National Sea Clammers Association</i> , 453 U.S. 1 .....	21, 23
<i>NLRB v. Robbins Tire &amp; Rubber Co.</i> , 437 U.S. 214 .....	27
<i>North Haven Board of Education v. Bell</i> , 456 U.S. 512 .....	23
<i>Northwest Airlines, Inc. v. Transport Workers</i> , 451 U.S. 77 .....	23
<i>Norwegian Nitrogen Products Co. v. United States</i> , 288 U.S. 294 .....	18
<i>Oklahoma Press Publishing Co. v. Walling</i> , 327 U.S. 186 .....	29
<i>Penfield Co. v. SEC</i> , 330 U.S. 585 .....	31
<i>Pennaluna &amp; Co., Benjamin A. Harrison &amp; Harry F. Magnuson, In re</i> , 44 S.E.C. 336 .....	2
<i>PepsiCo., Inc. v. SEC</i> , 563 F. Supp. 828.....	24, 27, 30, 31, 34
<i>Reiter v. Sonotone Corp.</i> , 442 U.S. 330 .....	17, 23
<i>Richards v. United States</i> , 369 U.S. 1 .....	17
<i>Reisman v. Caplan</i> , 375 U.S. 440 .....	30
<i>Scarafiotti v. Shea</i> , 456 F.2d 1052 .....	26
<i>SEC v. Certain Unknown Purchasers of the Com- mon Stock of, and Call Options for, the Common Stock of Santa Fe Int'l Corp.</i> , No. 81 Civ 6553 (WCC) (S.D.N.Y. Nov. 13, 1981) .....	32
<i>SEC v. Dresser Industries, Inc.</i> , 628 F.2d 1368, cert. denied, 449 U.S. 993 .....	26, 28, 31
<i>SEC v. Golconda Mining Co. &amp; Harry F. Magnuson</i> , 291 F. Supp. 125 .....	2
<i>SEC v. Howatt</i> , 525 F.2d 226 .....	30
<i>SEC, In re</i> , 84 F.2d 316, rev'd as moot, 299 U.S. 504 .....	11
<i>SEC v. Knopfler</i> , 658 F.2d 25, cert. denied, 455 U.S. 908 .....	30
<i>SEC v. Magnuson</i> , No. 82-1178-Z (D. Mass. Aug. 11, 1982) .....	5
<i>SEC v. Musella</i> , No. 83 Civ 342 (CSH) (S.D.N.Y. Jan. 19, 1984) .....	32

# VI

## Cases—Continued:

	Page
<i>SEC v. National Student Marketing Corp.</i> , 538 F.2d 404, cert. denied, 429 U.S. 1073 .....	12
<i>SEC v. Torr</i> , 15 F. Supp. 144 .....	18
<i>Sierra Club v. Morton</i> , 405 U.S. 727 .....	24
<i>Smith v. Maryland</i> , 442 U.S. 735 .....	21
<i>Sprecher v. Graber</i> , 716 F.2d 968 .....	30
<i>Steadman v. SEC</i> , 450 U.S. 91 .....	23
<i>Transactions in Washington Public Power Supply System Securities, In re</i> , No. HO-1556 (SEC Jan. 11, 1984) .....	33
<i>Transamerica Mortgage Advisors v. Lewis</i> , 444 U.S. 11 .....	21
<i>United States v. Bright</i> , 630 F.2d 804 .....	28
<i>United States v. Church of Scientology</i> , 520 F.2d 818 .....	30
<i>United States v. Erika</i> , 456 U.S. 201 .....	21
<i>United States v. Garden State National Bank</i> , 607 F.2d 61 .....	30
<i>United States v. Kis</i> , 658 F.2d 526, cert. denied, 455 U.S. 1018 .....	30
<i>United States v. Miller</i> , 425 U.S. 435...6, 7, 8, 14-15, 22, 26	
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632....	29
<i>United States v. Payner</i> , 447 U.S. 727 .....	15
<i>United States v. Powell</i> , 379 U.S. 48 .....	passim
<i>United States v. Proctor &amp; Gamble</i> , 356 U.S. 677..	28
<i>United States v. Rutherford</i> , 442 U.S. 544 .....	23
<i>United States v. Schutterle</i> , 586 F.2d 1201 .....	26
<i>United States v. Sells Engineering, Inc.</i> , No. 81-1032 (June 30, 1983) .....	27, 28
<i>United States v. Thriftyman, Inc.</i> , 704 F.2d 1240..	26
<i>United States v. Washington</i> , 431 U.S. 181 .....	14
<i>Vermont Yankee Nuclear Power Corp. v. NRDC</i> , 435 U.S. 519 .....	23-24
<i>Wedbush, Noble, Cooke, Inc. v. SEC</i> , No. CV-83-3961 CBM (KX) (July 11, 1983), appeal pending, No. 83-6035 (C.D. Cal.), stay denied, 714 F.2d 923 .....	13, 33
<i>Woolley v. United States</i> , 97 F.2d 258, cert. denied, 305 U.S. 614 .....	29

## VII

Constitution, statutes and rules :	Page
U.S. Const. :	
Amend. IV .....	14, 15, 26
Amend. V .....	8, 14
Due Process Clause .....	8, 14
Amend. VI .....	8, 14
Confrontation Clause .....	8, 14
Administrative Procedure Act, ch. 324, § 6 (b), 60	
Stat. 240, now recodified at 5 U.S.C. 555 (c) .....	28
Freedom of Information Act, 5 U.S.C. 552:	
5 U.S.C. 552 (b) (7) (A) .....	28
5 U.S.C. 552 (b) (7) (C) .....	28
Privacy Act, 5 U.S.C. 552a (k) (2) .....	28
Right to Financial Privacy Act, 12 U.S.C. 3401	
<i>et seq.</i> .....	6, 9
12 U.S.C. 3401 .....	20
12 U.S.C. 3401 (2) .....	20
12 U.S.C. 3401 (4) .....	20
12 U.S.C. 3401 (5) .....	20
12 U.S.C. 3405 .....	20
12 U.S.C. 3409 .....	20
12 U.S.C. 3410 (a) .....	20
12 U.S.C. 3410 (b) .....	21
12 U.S.C. 3410 (d) .....	20
12 U.S.C. 3410 (e) .....	21
12 U.S.C. 3410 (f) .....	20
12 U.S.C. 3411 .....	21
12 U.S.C. 3413 .....	20
12 U.S.C. 3414 .....	20
12 U.S.C. 3419 .....	21
Securities Act of 1933, 15 U.S.C. 77a <i>et seq.</i> .....	2
§ 8 (b), 15 U.S.C. 77h (b) .....	18
§ 19 (a), 15 U.S.C. 77s (a) .....	18
§ 19 (b), 15 U.S.C. 77s (b) .....	9, 17
§ 20 (b), 15 U.S.C. 77t (b) .....	11
§ 21, 15 U.S.C. 77u .....	18
§ 22 (b), 15 U.S.C. 77v (b) .....	9, 17
Securities Exchange Act of 1934, 15 U.S.C. 78a	
<i>et seq.</i> .....	2

# VIII

Constitution, statutes and rules—Continued:	Page
§ 15(b) (1), 15 U.S.C. 78o(b) (1) .....	18
§ 21, 15 U.S.C. 78u .....	9, 19
§ 21(a), 15 U.S.C. 78u(a) .....	9, 11, 17
§ 21(b), 15 U.S.C. 78u(b) .....	9, 17
§ 21(c), 15 U.S.C. 78u(c) .....	9, 17
§ 21(d), 15 U.S.C. 78u(d) .....	11
§ 21(e), 15 U.S.C. 78u(e) .....	11
§ 21(h), 15 U.S.C. 78u(h) .....	2, 9, 21, 22, 34, 1a-6a
§ 21(h) (1), 15 U.S.C. 78u(h) (1) .....	19
§ 21(h) (2), 15 U.S.C. 78u(h) (2) .....	19, 22
§ 22, 15 U.S.C. 78v .....	18
§ 23(a) (1), 15 U.S.C. 78w(a) (1) .....	18
Tax Reform Act of 1976, 26 U.S.C. 7609(3) .....	26
Fed. R. Crim. P. 6(e) .....	29
Securities and Exchange Commission Canons of Ethics, 17 C.F.R.:	
Section 200.735-2(b) .....	29
Securities and Exchange Commission Rules of Practice, 17 C.F.R.:	
Section 201.1 <i>et seq.</i> .....	12
Section 201.6 .....	12
Section 201.9 .....	12
Securities and Exchange Commission Informal and Other Procedures, 17 C.F.R. 202.5 .....	11-12
Section 202.5(a) .....	13
Section 202.5(c) .....	12
Securities and Exchange Commission Rules Relating to Investigations, 17 C.F.R.:	
Section 203.1 <i>et seq.</i> .....	6, 12
Section 203.5 .....	3
Section 203.7(a) .....	12
Miscellaneous:	
49 Fed. Reg. 2035 (1984) .....	34
H.R. 933, 97th Cong., 1st Sess. (1981) .....	21
H.R. Rep. 1383, 73d Cong., 2d Sess. (1934) .....	19
H.R. Rep. 1980, 79th Cong., 2d Sess. (1946) .....	28
H.R. Rep. 95-1383, 95th Cong., 2d Sess. (1978) .....	22



## IX

## Miscellaneous—Continued:

	Page
H.R. Rep. 96-1321 (Pt. 1), 96th Cong., 2d Sess. (1980) .....	13, 19, 23, 29, 31
3 L. Loss, <i>Securities Regulation 1955</i> (2d ed. 1961) .....	3
S. 1375, 97th Cong., 1st Sess. (1981) .....	21
S. Rep. 752, 79th Cong., 1st Sess. (1945) .....	28
S. Rep. 94-938, 94th Cong., 2d Sess. (1976) .....	26
Securities Act Release No. 5310 (Sept. 27, 1972) ..	12
SEC 2d Ann. Rep. (1936) .....	12
SEC Report of the Advisory Committee on Enforcement Policies and Practices (1972) .....	3

# **In the Supreme Court of the United States**

OCTOBER TERM, 1983

---

No. 83-751

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
PETITIONERS

v.

JERRY T. O'BRIEN, INC., ET AL.

---

*ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

---

## **BRIEF FOR THE PETITIONERS**

---

### **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 704 F.2d 1065. The order of the court of appeals denying rehearing and an opinion dissenting from the denial of rehearing (Pet. App. 25a-27a) are reported at 719 F.2d 300. The opinions of the district court (Pet. App. 9a-16a, 17a-24a) are not reported.

### **JURISDICTION**

The judgment of the court of appeals was entered on April 25, 1983. A timely petition for rehearing was denied on September 30, 1983 (Pet. App. 25a). The petition for a writ of certiorari was filed on November 4, 1983, and was granted on January 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## STATUTORY PROVISIONS INVOLVED

With the exception of Section 21(h) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(h), the pertinent provisions of the Securities Act of 1933 (Securities Act), 15 U.S.C. 77a *et seq.*, and the Securities Exchange Act of 1934 (Securities Exchange Act), 15 U.S.C. 78a *et seq.*, are set forth in the appendix to the petition for a writ of certiorari (Pet. App. 31a-32a). Section 21(h) of the Securities Exchange Act is set forth in the Addendum, *infra*, 1a-6a.

## STATEMENT

1. In September 1980, the Securities and Exchange Commission issued a formal order of investigation authorizing certain employees of its Seattle Regional Office to issue subpoenas for information needed in connection with an investigation of possible violations of the federal securities laws (Complaint, Exh. A). The order stated (*id.* at 2) that the Commission's staff had reported to the Commission information that "tend[ed] to show" that respondent Harry F. Magnuson and others<sup>1</sup> had engaged in certain stock transactions and practices that violated registration, reporting, and antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. The formal order directed the staff to conduct a

---

<sup>1</sup> The formal order identified respondents Benjamin A. Harrison and Pennaluna & Co., Inc., as being among the others who may have participated in the reported transactions (Complaint, Exh. A).

Respondent Harry F. Magnuson owns an accounting firm, respondent H.F. Magnuson & Co., and major interests in several corporations. Magnuson has been permanently enjoined from violating provisions of the federal securities laws. *SEC v. Golconda Mining Co. & Harry F. Magnuson*, 291 F. Supp. 125 (S.D.N.Y. 1968). Additionally, in 1970, the Commission permanently barred Magnuson and respondent Harrison from the broker-dealer industry for violations of the federal securities laws. *In re. Pennaluna & Co., Benjamin A. Harrison & Harry F. Magnuson*, 44 S.E.C. 336 (1970).

"private investigation"<sup>2</sup> into the transactions and, under authority granted in the 1933 and 1934 Acts, to subpoena testimony and documents "deemed relevant or material to the inquiry" (Complaint, Exh. A at 3).

During the course of its investigation, the staff subpoenaed Magnuson's customer records at respondent Jerry T. O'Brien, Inc. ("O'Brien"), a securities broker-dealer firm, as well as other information concerning Magnuson believed to be in the possession of Pennaluna & Co., Inc. (Complaint, Exhs. D, I). O'Brien complied with the subpoenas issued to it, but Pennaluna's counsel, who also represented O'Brien, notified the Commission that Pennaluna did not intend to comply (Complaint, Exh. N). The staff responded that it would recommend to the Commission that it institute a district court proceeding to have its subpoena enforced (Complaint, Exh. P). At the same time, in response to repeated inquiries from counsel, the staff informed O'Brien that it should consider itself a subject of investigation (*ibid.*).

Several days later, O'Brien, Pennaluna, and their individual owners<sup>3</sup> brought this suit in the United States District Court for the Eastern District of Washington to enjoin the Commission's investigation and to restrain Magnuson from complying with several outstanding subpoenas (Complaint 17-18). O'Brien alleged that the Commission's formal order was defective and that the staff

---

<sup>2</sup> The Commission's rules governing investigations expressly provide that, "[u]nless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public." 17 C.F.R. 203.5. See also 3 L. Loss, *Securities Regulation* 1955 (2d ed. 1961) (noting that virtually all Commission investigations are non-public); SEC, *Report of the Advisory Committee on Enforcement Policies and Practices* 18 (1972).

<sup>3</sup> Respondent Jerry T. O'Brien owns O'Brien, and respondent Harrison owns Pennaluna & Co., Inc. Since these respondents are jointly represented, we refer to them collectively as "O'Brien."

was conducting the investigation improperly.<sup>4</sup> Magnuson filed a cross-claim making similar allegations and seeking, among other things, to enjoin the investigation.

On September 28, 1981, the district court held a hearing on O'Brien's motion for expedited discovery. O'Brien sought to depose the Commission officers conducting the investigation and to obtain virtually all of the Commission's files concerning the investigation. At the hearing, the Commission informed the court that it would promptly move to dismiss the suit (Tr. 47-49), arguing that O'Brien merely wanted to discover what evidence the Commission had collected (Tr. 50, 58)<sup>5</sup> and that any discovery should be deferred. The district court denied the motion for expedited discovery, stating that O'Brien "wants to go through your pockets, I realize that" (Tr. 58). At the court's request, the Commission agreed to delay any proceedings for enforcement of the outstanding subpoenas until the court determined whether the suit should be dismissed (Tr. 54, 56, 61, 70).

2. In January 1982, the district court dismissed respondents' claims for injunctive relief, reasoning that their challenges to the investigation could be litigated if

---

<sup>4</sup> Respondent O'Brien alleged, among other things, that the Commission's formal order did not expressly name it and others under investigation and that therefore the Commission had not found that each person being investigated had likely committed a violation (Complaint 3-16); that the Commission did not have a valid purpose for its investigation and should have provided each person subject to the investigation with notice of, and the opportunity to comment on, the commencement of the investigation (*id.* at 10); that the Commission was reinvestigating matters litigated and settled by the parties in 1975 (*id.* at 9); and that the Commission had violated the constitutional, statutory, and common law privacy rights of the persons subject to the investigation (*id.* at 10, 14).

<sup>5</sup> In urging expedited discovery, respondent O'Brien conceded, "I'm not here today to say that the S.E.C. has done anything wrong, I can't prove it, I haven't had the discovery. What we're asking is for some limited discovery to be able to see if the S.E.C. has exceeded its powers" (Tr. 33).

and when the Commission instituted a subpoena enforcement action in district court (Pet. App. 17a-24a). The court nevertheless determined (*id.* at 18a-22a) that the outstanding subpoenas "fully me[t] the four-part \* \* \* test" for judicial enforcement set forth in *United States v. Powell*, 379 U.S. 48 (1964). The court found that the Commission's formal order of investigation stated a legitimate purpose, that the subpoenas requested relevant information, that the information sought was not already in the Commission's possession, and that the Commission had followed proper administrative steps in issuing the subpoenas (Pet. App. 19a-21a).<sup>6</sup>

Respondents appealed and moved the district court for an injunction pending appeal. In that motion, respondents for the first time sought notice of subpoenas issued to third parties. The district court issued a second order declining to "fashion such a novel remedy" (Pet. App. 12a). The court explained that respondents lacked standing to restrain voluntary compliance with subpoenas issued to others and, in any event, had adequate remedies at law (*id.* at 13a). The court of appeals also denied respondents' motion for a stay pending appeal.

The Commission then sought enforcement of outstanding subpoenas. In two separate proceedings involving subpoenas to Magnuson's family members and his bank, the courts rejected challenges to the lawfulness of the investigation.<sup>7</sup> Despite these rulings, the Commission has yet to

---

<sup>6</sup> The district court found it unnecessary to consider the Commission's compliance with *Powell* "[w]ith respect to [subpoenas issued to] plaintiff O'Brien personally" because he had "voluntarily complied" with [them] (Pet. App. 21a). The court expressed reservations, however, concerning the merits of O'Brien's contention that he personally had not been properly "targeted" in the formal order of investigation (Pet. App. 19a n.2; see also *id.* at 11a n.4).

<sup>7</sup> See *SEC v. Magnuson*, No. 82-1178-Z (D. Mass. Aug. 11, 1982) (enforcing three Commission subpoenas directed to Magnuson family members); *Magnuson v. SEC*, No. 82-2042 (D. Idaho July 27, 1982) (denying Magnuson's and his wife's motions under the Right

obtain information directly from Magnuson. The Commission brought a subpoena enforcement proceeding against Magnuson and other respondents in this case in which the legitimacy of the Commission's investigation was again contested. That proceeding has been under submission for more than one and one-half years.<sup>8</sup>

3. In April 1983, the court of appeals affirmed the dismissal of all respondents' injunctive claims except their request for notice of subpoenas issued to others (Pet. App. 1a-8a). The court of appeals agreed with the district court that respondents had an adequate remedy at law to challenge subpoenas directed to them (*id.* at 3a-4a). It also agreed that, under *United States v. Miller*, 425 U.S. 435 (1976), and *Donaldson v. United States*, 400 U.S. 517 (1971), respondents had no right to block disclosure of documents held by third parties (Pet. App. 6a). The court stated, however, that even if "targets" of investigations have no right to protect evidence in the hands of a third party, they "have a right to be investigated consistently with the *Powell* standards" (Pet. App. 6a-7a).<sup>9</sup> To protect this right, the court concluded, "targets" are entitled to notice of every subpoena issued in an investigation (*id.* at 7a). The court reasoned that "targets" would then have the opportunity to challenge each subpoena's compliance with *Powell* by attempting to restrain third parties' voluntary compliance, seeking permissive intervention in subpoena enforcement proceedings, or filing "other appropriate district court proceedings" (*id.* at 4a-5a, 7a).

---

to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.*, to quash subpoenas directed to a financial institution).

<sup>8</sup> *SEC v. Magnuson, et al.*, No. C-82-282-RJM (E.D. Wash.) (under submission since July 1982).

<sup>9</sup> The court of appeals did not define "target," a term not found in the federal securities laws or in the Commission's rules governing its investigations. See 17 C.F.R. 203.1 *et seq.* See pages 32-33, *infra*.

The court of appeals cited no constitutional or statutory basis for ordering such notice, and it rejected the Commission's contention that in federal agency investigations "courts may not impose procedural requirements upon agencies" beyond those required by the Constitution or statutes (Pet. App. 5a-6a n.8).<sup>10</sup> The court did not discuss the impact that its notice requirement might have on law enforcement, other than to state its view that notice would not "unduly burden the agency or the courts" since compliance with *Powell* could be determined on affidavits (*id.* at 7a).

4. The Commission filed a petition for rehearing with a suggestion for rehearing en banc. The Commission's petition was supported by an amicus curiae brief filed by the United States on behalf of more than 20 agencies whose practices were threatened by the decision (U.S. Am. Br. 2 n.1).

The court of appeals denied the Commission's petition, with five judges dissenting (Pet. App. 25a-27a). Writing for the dissenters, Judge Kennedy stated that the panel's "most erroneous" decision "goes beyond any reasonable interpretation" of *Powell* and *Miller* and constitutes "an improper intrusion" into administrative practices (Pet. App. 26a). Furthermore, he expressed concern that the decision would have adverse consequences on law enforcement (*id.* at 26a-27a):

Not only will wrongdoers be provided a new instrument of obstruction or delay, but also employees and others subject to reprisals will be chilled from cooperating with investigators. Under the panel decision, government agencies will find it increasingly difficult to conduct confidential, nonpublic investigations in which actual targets are not discovered until a number of subpoenas have been served.

---

<sup>10</sup> The court of appeals did not disturb the district court's *Powell* findings, holding that the appeal "present[ed] only questions of law" (Pet. App. 1a).



Agencies may instead be forced to articulate premature conclusions about potential targets.

Finally, Judge Kennedy emphasized that "[t]here is no principled basis for confining the panel holding to the context of an SEC investigation. It threatens to compromise government investigations by most agencies" (*id.* at 26a).

### SUMMARY OF ARGUMENT

There is no basis for the court of appeals' decision requiring the Commission to give so-called "targets" of its investigations notice of all subpoenas issued to third parties.

#### I

As respondents concede, the decision below is not supported by any constitutional provision. After exhaustively reviewing the procedures used by agencies in non-adjudicative investigations, this Court held in *Hannah v. Larche*, 363 U.S. 420 (1960), that neither the Due Process Clause of the Fifth Amendment nor the Confrontation Clause of the Sixth Amendment requires an agency to notify "targets" of the collection of adverse evidence or the identity of accusers. This Court has also held that an individual's Fifth Amendment privilege against self-incrimination is not violated when records held by a third party are subpoenaed. *Fisher v. United States*, 425 U.S. 391, 397 (1976). Finally, the Court has repeatedly held that the Fourth Amendment does not afford an individual a protectable interest in records held by third parties or the right to notice of or the opportunity to challenge the validity of subpoenas for such records. *United States v. Miller*, 425 U.S. 435 (1976); *Donaldson v. United States*, 400 U.S. 517 (1971).

#### II

There is also no statutory basis for the court of appeals' notice requirement. The language, scheme, and

legislative history of the Securities Act of 1933 and the Securities Exchange Act of 1934 demonstrate that Congress did not intend to require the Commission to furnish "targets" with notice of third-party subpoenas. In those statutes, Congress empowered the Commission to investigate promptly and effectively, to employ subpoenas in aid of its investigations, and to fashion, within constitutional limits, its own procedures for conducting investigations. See 15 U.S.C. 77s(b), 77v(b), 78u(a), (b) and (c). Nowhere in those laws or their legislative history is there any hint that Congress intended to hamstring the Commission with a requirement that it notify so-called "targets" of its investigations each time subpoenas are issued to third parties.

When Congress has intended to require the Commission to provide notice of the issuance of its subpoenas, it has done so expressly in carefully crafted legislation designed to ensure that notice cannot be used to delay or obstruct investigations. In 1980, Congress enacted Section 21(h) of the Securities Exchange Act, 15 U.S.C. 78u(h), incorporating into the federal securities laws the Right to Financial Privacy Act of 1978 (RFPA), 12 U.S.C. 3401 *et seq.* Under Section 21(h), the Commission now must provide notice in narrowly defined circumstances: "customers" must be notified when the Commission subpoenas certain records from "financial institutions." But Section 21(h) and the RFPA contain extensive safeguards to prevent undue interference with Commission investigations. For example, a customer has only a short period within which to challenge the subpoena in court; a prompt judicial decision is required; the customer may not appeal any adverse decision until the Commission completes its investigation; and all applicable statutes of limitations are tolled during the pendency of the challenge. By enacting this limited notice provision, Congress clearly expressed its understanding that the Commission was not obligated to furnish notice of its subpoenas in other circumstances.

## III

The court of appeals' sole stated reason for imposing its notice requirement was to enforce compliance with *United States v. Powell*, 379 U.S. 48 (1964). But *Powell* provides no support for the decision below.

In *Powell*, the Court interpreted the Internal Revenue Code to require the Internal Revenue Service to make a certain showing when it seeks judicial enforcement of an administrative summons. *Powell* had nothing to do with notice of third-party subpoenas, and the Court's opinion said nothing about that subject. *Powell* was concerned exclusively with the rights of a recipient of a summons, not with the rights of a "target." Thus, the premise of the court of appeals' decision—that a "target" has a "right to be investigated consistently with the *Powell* standards" (Pet. App. 6a)—is fundamentally incorrect.

Furthermore, a "target" may not object on *Powell* grounds when an agency obtains records without a subpoena or when a third-party recipient voluntarily complies with a subpoena. Even when a district court proceeding is brought against a third party for enforcement of a subpoena, a "target" has no right to intervene and question compliance with *Powell*. At most, the "target" may seek permissive intervention. These settled principles refute the notion that "targets" have a general, enforceable right "to be investigated consistently with" *Powell*.

## IV

The court of appeals' notice requirement will cause serious, adverse consequences to law enforcement that Congress simply could not have intended. Notice will provide "targets" with a road map of agency investigations, thereby increasing their ability to destroy evidence, influence testimony, threaten or bribe witnesses, and abscond with assets. Additionally, persons receiving notice may delay and obstruct investigations by challenging every subpoena. Such delay is particularly damaging

to the Commission, whose ability to protect the nation's securities markets depends on the rapid exercise of its investigative powers. Furthermore, the court of appeals' decision leaves unanswered numerous critical questions, including the definition of a "target," the rights of a "target" following notice, and the remedies for noncompliance with the notice requirement. Such uncertainties, which Congress carefully avoided in enacting the limited notice requirement contained in the RFPA, threaten many important investigations conducted by the Commission and other law enforcement agencies.

## ARGUMENT

### THE SECURITIES AND EXCHANGE COMMISSION IS NOT REQUIRED TO NOTIFY "TARGETS" OF ITS INVESTIGATIONS THAT SUBPOENAS HAVE BEEN ISSUED TO THIRD PARTIES

#### A. The Court Of Appeals' Notice Procedure Is Not Re- quired By The Constitution, By Any Statute Or Rule, Or By Any Decision Of This Court

Since its inception 50 years ago, the Securities and Exchange Commission has conducted investigations without providing "targets" with notice of, or the opportunity to challenge, the gathering of information from other persons by subpoena. The Commission's investigations have no parties and no designated "targets"; they do not adjudicate facts or legal rights.<sup>11</sup> Rather, Commission investigations are conducted to determine whether law enforcement proceedings—in which rights of parties are adjudicated—should be commenced. See, e.g., Section 20(b) of the Securities Act, 15 U.S.C. 77t (b) and Section 21(a), (d) and (e) of the Securities Exchange Act, 15 U.S.C. 78u(a), (d) and (e); 17 C.F.R.

---

<sup>11</sup> See *Hannah v. Larche*, 363 U.S. 420, 446-447 (1960); *In re SEC*, 84 F.2d 316, 318 (2d Cir.), rev'd as moot, 299 U.S. 504 (1936).

202.5. Thus, the Commission's regulations provide for notice and other rights in adjudicative proceedings, but not in investigations.<sup>12</sup> When the staff intends, at the conclusion of an investigation, to recommend to the Commission that it commence an adjudicative proceeding, it is authorized to explain to interested persons the nature of its investigation and to afford them the opportunity to make a written submission to the Commission concerning their views.<sup>13</sup>

The Commission has the authority under all the statutes it administers to issue subpoenas in aid of its investigations and to invoke the assistance of the federal courts in their enforcement (see Pet. App. 31a-38a). The Commission maintains stringent internal controls on the use of its subpoena powers. The staff has no authority to issue subpoenas without Commission authorization. Before it may issue subpoenas, the staff must obtain from the Commission's presidentially-appointed members a "formal order of investigation" authorizing use of sub-

---

<sup>12</sup> The Commission's Rules of Practice, 17 C.F.R. 201.1 *et seq.*, establish the procedures applicable in adjudicative proceedings "which involve a hearing or opportunity for hearing before the Commission." The Rules of Practice provide for, among other things, notice, hearing and cross-examination. 17 C.F.R. 201.6, 201.9. By contrast, the Commission's Rules Relating to Investigations, 17 C.F.R. 203.1 *et seq.*, do not provide for such trial-type procedures. Since at least 1936, the Commission's rules have expressly made trial-type procedures, such as notice, inapplicable to investigations. See *SEC 2d Ann. Rep.* 73 (1936). The Commission's rules, however, afford all witnesses the opportunity, upon request, to be shown the formal order of investigation. 17 C.F.R. 203.7(a).

<sup>13</sup> 17 C.F.R. 202.5(c); Securities Act Release No. 5310 (Sept. 27, 1972). Even at the point at which the staff has determined to recommend that the Commission commence enforcement proceedings, there is no constitutional or statutory requirement that the Commission notify prospective defendants. "Mandating such a procedure would seriously burden the Commission's enforcement procedure, already characterized by adequate due process safeguards." *SEC v. National Student Marketing Corp.*, 538 F.2d 404, 407 (D.C. Cir. 1976), cert. denied, 429 U.S. 1073 (1977).

poenas by designated staff members in investigating particular transactions. 17 C.F.R. 202.5 (a).<sup>14</sup>

**1. *The Constitution does not require the Commission to provide "targets" of its investigations with notice of subpoenas issued to other persons***

The court of appeals cited no provision of the Constitution to support its holding that the Commission must depart from its historic practices and provide "targets" of its investigations with notice of the gathering of information from others by subpoena. Respondents concede that "[t]he court of appeals decision is not based on constitutional provisions" (O'Brien Br. in Opp. 21 n.14; see Magnuson Br. in Opp. 2, 26).<sup>15</sup>

The court of appeals and respondents presumably recognize that this Court's decisions foreclose any argument that the Constitution requires notice to "targets" concerning subpoenas issued to others. In *Hannah v. Larche*, 363 U.S. 420 (1960), this Court exhaustively examined the procedures that have historically governed investigations conducted by grand juries, legislative com-

<sup>14</sup> See H.R. Rep. 96-1321 (Pt. 1), 96th Cong., 2d Sess. 4 n.2 (1980):

[T]he staff has no authority to issue compulsory process without Commission approval. When it appears that the issuance of process may be necessary to develop the facts concerning a matter under inquiry, the staff brings the matter to the Commission's attention. If the Commission, by majority vote of its five congressionally approved members, concurs with the staff's assessment, a formal order of investigation issues. This order sets forth, among other things, the names of the specific staff members authorized to issue subpoenas in conjunction with the investigation and the statutory authority pursuant to which the Commission has adopted the order.

<sup>15</sup> Notwithstanding the fact that the court of appeals did not rely on any constitutional provision, one district court in the Ninth Circuit has construed the decision as holding that there is a "due process right to notice of third party subpoenas." *Wedbush, Noble, Cooke, Inc. v. SEC*, No. CV-83-3961 (CBM) (KX) (July 11, 1983), appeal pending, No. 83-6085 (C.D. Cal.).

mittees, and executive and independent agencies, including the Commission. The Court concluded that neither the Due Process Clause of the Fifth Amendment nor the Confrontation Clause of the Sixth Amendment requires an agency to notify persons under investigation of the collection of adverse evidence, the identity of their accusers, or the specific charges being investigated. The Court explained (363 U.S. at 449-451) that the Due Process Clause does not require such notice in agency investigations since the investigations do not adjudicate legal rights. The Court added (*id.* at 440) that such notice is not required by the Confrontation Clause because its protections become applicable only when criminal proceedings have been initiated. *Id.* at 440 n.16. And the Court observed (*id.* at 443-444) that requiring "trial-like" procedures, such as notice, would "make a shambles of the investigation and stifle the agency in its gathering of facts."

This Court has also held that the Fifth Amendment's privilege against compelled self-incrimination does not apply to a subpoena issued to a third party since such a subpoena does not compel the "target" to give testimony. *Fisher v. United States*, 425 U.S. 391, 397 (1976); *Couch v. United States*, 409 U.S. 322, 328-329 (1973). Cf. *United States v. Washington*, 431 U.S. 181, 189 (1977) (one's status as a "target" of a grand jury investigation "neither enlarges nor diminishes the [Fifth Amendment] protection against compelled self-incrimination," and thus prosecutors need not provide special notice to a "target").

Nor does the Fourth Amendment provide a basis for the court of appeals' notice requirement. In *United States v. Miller*, 425 U.S. 435, 443 (1976), and *Donaldson v. United States*, 400 U.S. 517, 522, 530, 531 (1971), this Court held that the Fourth Amendment does not afford a "target" of an investigation rights to notice of or the opportunity to challenge the validity of government subpoenas directed to other persons. In *Miller*, the



Court affirmed a criminal conviction based upon information obtained from the defendant's banks, without his knowledge, pursuant to defective government subpoenas. The Court confirmed its repeated holding that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that \* \* \* confidence placed in the third party will not be betrayed" (425 U.S. at 443).<sup>16</sup> Consequently, the Court explained, the validity of the subpoenas was irrelevant since "[t]he banks upon which they were served did not contest their validity." *Id.* at 446 n.9. The failure to notify the customer of the issuance of subpoenas was likewise "without legal consequences" since the defendant lacked a Fourth Amendment interest in the subpoenaed records. 425 U.S. at 443 n.5. See also *United States v. Payner*, 447 U.S. 727, 731-732, 735 (1980).

In *Donaldson*, the Court held that the "target" of an investigation had no right to restrain a third party's voluntary compliance with an Internal Revenue Service summons based solely on the "target's" potential civil or criminal liability. 400 U.S. at 530-531. The Court further recognized that, were it to allow the "target" to restrain voluntary compliance by others and then to intervene in summons enforcement proceedings, it "would unwarrantedly cast doubt upon and stultify the [IRS's] every investigatory move." *Id.* at 531.

---

<sup>16</sup> In *Miller*, the Court held that Congress's passage of the Bank Secrecy Act did not alter the well-settled principle that an agency subpoena "directed to a third party bank does not violate the Fourth Amendment rights of a depositor under investigation." 425 U.S. at 444. See also *Donaldson v. United States*, 400 U.S. at 522.



**2. *The Securities Act and the Securities Exchange Act authorize the Commission to investigate privately without providing "targets" with notice of subpoenas issued to other persons***

The court of appeals cited no statutory basis for its notice procedure; nor did it consider the Commission's governing statutes or its rules. Respondents nevertheless interpret the court of appeals' notice procedure as based upon the statutes that authorize the Commission to use subpoenas (O'Brien Br. in Opp. 6; see Magnuson Br. in Opp. 21, 24, 26). They state that Congress required the Commission to invoke the aid of the federal courts for enforcement of its subpoenas in order to "check and balance possible abuse" (O'Brien Br. in Opp. 13-14; *id.* at 9; Magnuson Br. in Opp. 22, 30). Accordingly, respondents reason that notice to "targets" is necessary to effectuate the intended statutory check since third parties do not have the incentive to litigate the agency's compliance with its obligations (O'Brien Br. in Opp. 6-7, 8, 9, 13-14; Magnuson Br. in Opp. 22, 36).

As we demonstrate, however, the court of appeals' notice procedure conflicts with the language, context, history, and purposes of the provisions authorizing the Commission's use of subpoenas. There is no evidence that Congress ever intended to hamstring the Commission and other law enforcement agencies with the procedural requirement devised by the court of appeals. On the contrary, in those narrow circumstances in which Congress intended that the Commission afford notice of its subpoenas, Congress has expressly so provided.

a. As this Court has emphasized repeatedly, the starting point in any case involving the interpretation of a statute is the language employed by Congress. *INS v. Phinpathya*, No. 82-91 (Jan. 10, 1984), slip op. 5; *Bread Political Action Committee v. FEC*, 455 U.S. 577, 580 (1982); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). Furthermore, it is "assume[d] that the legisla-

tive purpose is expressed by the ordinary meaning of the words used.' " *INS v. Phinpathya*, slip op. 5), quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979), and *Richards v. United States*, 369 U.S. 1, 9 (1962)).

Nothing in the language of the relevant provisions of the securities laws—Sections 19(b) and 22(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), 77v(b), and Sections 21(a), (b) and (c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a), (b) and (c)—even remotely suggests that Congress intended to provide "targets" of Commission investigations with the right to notice of third-party subpoenas.<sup>17</sup> These statutory provisions give the Commission broad discretion to conduct such investigations as it deems necessary in order to inquire into possible violations of the Acts. 15 U.S.C. 77s(b); 15 U.S.C. 78u(a). They authorize "any member of the Commission" or designated officer to "subpoena witnesses" and "require the production" of relevant records in aid of any investigation "from any place in the United States or any Territory at any designated place of hearing." 15 U.S.C. 77s(b); 15 U.S.C. 78u(b). In addition, they authorize the Commission to apply to the appropriate federal court for enforcement of the Commission's subpoenas. 15 U.S.C. 77v(b); 15 U.S.C. 78u(c). By their terms, these provisions prescribe only the persons who may issue subpoenas, the territorial limits of subpoenas, and the proper venue for subpoena enforcement actions. Notably absent is any requirement that

---

<sup>17</sup> The present case concerns an investigation authorized by and subpoenas issued under provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 (see Complaint, Exh. A), and we therefore discuss the provisions of those Acts governing Commission subpoenas and investigations. Other securities laws enforced by the Commission (see Pet. App. 33a-38a) likewise contain no provisions that support the notice requirement imposed by the court of appeals.

so-called "targets" be given notice of third-party subpoenas.

Nor is there anything in the legislative schemes of the 1933 and 1934 Acts to suggest that Congress intended to impose notice procedures on Commission investigations.<sup>18</sup> Both Acts delegate to the Commission the "power to make such rules and regulations as may be necessary or appropriate to implement their provisions \* \* \*." Section 23(a)(1) of the Securities Exchange Act, 15 U.S.C. 78w(a)(1); Section 19(a) of the Securities Act, 15 U.S.C. 77s(a). Such language, this Court has held, is broad enough to empower the Commission to establish, within constitutional limits, "standards for determining whether to conduct an investigation publicly or in private \* \* \*." See *FCC v. Schreiber*, 381 U.S. 279, 292 (1965).<sup>19</sup> The Commission has determined that it must be able to conduct its investigations in private, without alerting "targets" to subpoenas, in order to detect and prevent manipulation, fraud, and other misconduct affecting the nation's securities markets. This decision is "well within the Commission's statutory authority." *Id.* at 288.

Finally, there is nothing in the legislative history of the 1933 or 1934 Acts to suggest that Congress did not mean what it plainly said—that the Commission is free, within constitutional limits, to establish its own inves-

---

<sup>18</sup> By contrast, in the Securities Act and the Securities Exchange Act, Congress prescribed notice and hearing procedures for adjudicatory proceedings. See Sections 8(b) and 21 of the Securities Act, 15 U.S.C. 77h(b) and 77u; Sections 15(b)(1) and 22 of the Securities Exchange Act, 15 U.S.C. 78o(b)(1) and 78v. See also *SEC v. Torr*, 15 F. Supp. 144 (S.D.N.Y. 1936).

<sup>19</sup> See also *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940) (administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties"); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 321-322 (1933).

tigatory procedures. Indeed, the legislative history amply reflects Congress's intent to delegate to the Commission a maximum degree of administrative flexibility<sup>20</sup> and the tools necessary to conduct timely and effective investigations.<sup>21</sup>

b. Congress's amendment of Section 21 of the Securities Exchange Act in 1980 confirms that it knows how to require the Commission to give notice of its subpoenas and has done so expressly and in elaborate detail in those narrow circumstances in which it has found notice desirable. In Section 21(h)(1), 15 U.S.C. 78u(h)(1), Congress incorporated into the federal securities laws the Right to Financial Privacy Act of 1978 (RFPA).<sup>22</sup> The RFPA creates a limited statutory right in "customers" of banks and similar financial institutions to privacy for

---

<sup>20</sup> See, e.g., H.R. Rep. 1383, 73d Cong., 2d Sess. 7 (1934); see also *id.* at 6.

<sup>21</sup> As it explained when it amended Section 21 of the Securities Exchange Act in 1980, "Congress [has] endowed the Commission with 'broad powers' to conduct investigations in support of its statutory mandate to protect the public interest through *prompt and effective* enforcement of the federal securities laws." H.R. Rep. 96-1321 (Pt. 1), 96th Cong., 2d Sess. 6 (1980) (emphasis added). See also *id.* at 5 n.4 ("As the courts have recognized, '[t]he very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties \* \* \* is the rapid exercise of the power to investigate.' *FMC v. Port of Seattle*, 521 F.2d 481, 483 (9th Cir. 1975)").

<sup>22</sup> The RFPA expressly exempted the Securities and Exchange Commission from its coverage for a period of two years. 92 Stat. 3710. In addition, Congress created in Section 21(h)(2) of the Securities Exchange Act a special exemption for the Commission from the RFPA's pre-access notification requirements. Section 21(h)(2) empowers the Commission to seek an *ex parte* court order authorizing it to delay giving notice on the grounds, among others, that the Commission has reason to believe that notice would result in the destruction of, or tampering with, evidence; the transfer of assets or records outside the territorial limits of the United States; or the improper conversion of investor assets. 15 U.S.C. 78u(h)(2).

records that reflect their private transactions. 12 U.S.C. 3401. It does not confer upon "targets" a right to notice of subpoenas directed to "third parties."

The RFPA provides, among other things, that "customers" are entitled to notice of and the opportunity to challenge administrative subpoenas to their "financial institutions" for certain "financial records." 12 U.S.C. 3401, 3405. It prescribes the persons entitled to notice, the types of records that are protected, and the circumstances in which notice is unnecessary or may be deferred. 12 U.S.C. 3401(4), 3401(2), 3409, 3413, 3414. The RFPA thus requires a "target" of a Commission investigation to be notified of a subpoena only in those limited circumstances in which he also is a "customer,"<sup>28</sup> the subpoena seeks information from a "financial institution," and the information sought constitutes a "financial record" as defined by the Act.

The RFPA contains numerous carefully crafted provisions that ensure that notice cannot be used to obstruct or delay an agency investigation. Under the Act, the customer has only a short period within which to file a "customer challenge" proceeding in court. 12 U.S.C. 3410(a). In addition, the customer has no right to appeal any adverse determination until the government's investigation is completed and no standing to assert the rights of the bank. 12 U.S.C. 3410(d), 3410(f). The government's law enforcement efforts are further protected by provisions that expressly permit the government to obtain in camera review of its response to a customer challenge, require a judicial decision on the challenge

---

<sup>28</sup> The term "customer" means "any person" or authorized representative of that person who utilizes the services of a financial institution. 12 U.S.C. 3401(5). A "person" is defined as "an individual or a partnership of five or fewer individuals." 12 U.S.C. 3401(4). Since the Act expressly excludes corporations from the definition of a "customer," several of the respondents in this case would not be entitled to notice, even under the RFPA, if the Commission subpoenaed their bank records.

within seven days of the government's response, require the financial institution to assemble the subpoenaed documents for production during the pendency of the challenge, and, perhaps most important, toll any applicable statute of limitations until the challenge is decided. 12 U.S.C. 3410(b), 3411, 3419. Finally, the Act makes the "challenge procedures \* \* \* the sole judicial remedy available to a customer to oppose disclosure of financial records pursuant to this title." 12 U.S.C. 3410(e).

The strictly limited statutory right to notice provided by Section 21(h) demonstrates that Congress did not intend that the Commission be subject to the broad, ill-defined notice requirement imposed by the court of appeals. "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14-15 (1981) (quoting *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 19 (1979)). See also *United States v. Erika*, 456 U.S. 201, 208 (1982); *Andrus v. Allard*, 444 U.S. 51, 62 (1979). If Congress had wanted to construct the type of procedural right created by the court of appeals in this case, it could easily have done so.<sup>24</sup> The fact that Congress did not do so compels the conclusion that it was simply unwilling to impose such a generalized procedural burden on the Commission and other law enforcement agencies.<sup>25</sup>

---

<sup>24</sup> For example, it could have substituted the word "target" for the word "customer" in Section 21(h) or in the RFP, and could have made the notification procedure applicable to all subpoenas, not just those that are issued to financial institutions and seek a limited class of records.

<sup>25</sup> It is significant that Congress has declined to extend even the limited notice procedures of the RFP to other types of records. See, e.g., H.R. 933, 97th Cong., 1st Sess. (1981) (proposing notice with regard to telephone records); S. 1375, 97th Cong., 1st Sess. (1981) (same). See also *Smith v. Maryland*, 442 U.S. 735, 744-745 (1979).

c. The legislative history of Section 21(h) and the RFPFA amply supports this conclusion. The RFPFA was a congressional response to this Court's decision in *United States v. Miller* that a customer of a bank has "no standing under the Constitution to contest Government access to financial records." H.R. Rep. 95-1383, 95th Cong., 2d Sess. 34 (1978). The RFPFA was intended, however, "to strike a balance between customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations," a balance that the decision below overturns.<sup>26</sup> Congress expressly stated its intent that this balance should not be altered by judicial implication of additional remedies. H.R. Rep. 95-1383, at 54, 56, 225, 230. Congress also exempted the Commission from the RFPFA for a period of two years, "in recognition of [the Commission's] rigorous internal procedures" for using its subpoena powers and its need to obtain financial records promptly in its investigations. H.R. Rep. 95-1383, at 247.

22 When Congress finally applied the RFPFA to the Commission in 1980, it again attempted to "ensur[e] that the assertion of privacy rights [would] not serve as a sword for delay and obstruction." H.R. Rep. 96-1321 (Pt. 1), at 4. Accordingly, as mentioned above (see page 19 note 21, *supra*), Congress created in new Section 21(h)(2) of the 1934 Act a special exemption for the Commission from the RFPFA's pre-access notification requirements because of its concern that "delay in conducting an investigation could impede the Commission in taking the remedial action necessary to protect the investing public and the securities markets." H.R. Rep. 96-1321 (Pt. 1), at 8. Congress also reiterated its caveat against judicial implication of remedies not expressly provided for

<sup>26</sup> See H.R. 95-1383, at 33. See also *id.* at 245-246 (noting that the Act achieves a very "delicate balance" between the individual's statutory right to privacy and "the right of members of our society to full and efficient enforcement of our Federal laws \* \* \*"); H.R. Rep. 96-1321 (Pt. 1), 96th Cong., 2d Sess. 2 (1980).



by the Act. See, e.g., H.R. Rep. 96-1321, at 10 (noting that the remedies for a violation of the RFPA "shall not be supplemented by judicially imposed suppression of any financial records \* \* \*").

Thus, Congress forcefully demonstrated its intent that notice procedures should be required only where it has imposed them. The court of appeals was not free "to ignore this legislative judgment." *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. at 18. Nor was it authorized to "rewrite [the] legislation in accord with [its] own conceptions of prudent public policy." *United States v. Rutherford*, 442 U.S. 544, 555 (1979); see also *id.* at 559. "The question [was] not what [the] court [thought was] generally appropriate to the regulatory process; it [was] what Congress intended \* \* \*." *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977).<sup>27</sup>

**3. *This Court's decision in United States v. Powell does not confer a procedural right to notice upon "targets" of agency investigations***

The court of appeals interpreted this Court's decision in *United States v. Powell*, 379 U.S. 48 (1964), as conferring upon "targets" of agency investigations a right to be investigated by third-party subpoenas that would

---

<sup>27</sup> See also *Baltimore Gas & Electric Co. v. NRDC*, No. 82-524 (June 6, 1983), slip op. 9; *North Haven Board of Education v. Bell*, 456 U.S. 512, 536 n.26 (1982) ("These policy considerations were for Congress to weigh, and we are not free to ignore the language and history of Title IX even if we were to disagree with the legislative choice."); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97 (1981) ("The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs"); *Steadman v. SEC*, 450 U.S. 91, 104 (1981); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 220-221 (1980) ("questions of public policy cannot be determinative of the outcome unless specific policy choices fairly can be attributed to Congress itself"); *Reiter v. Sonotone Corp.*, 442 U.S. at 345; *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435



be judicially enforceable if directed to the "targets" themselves. The court reasoned that notice of subpoenas issued to third parties was necessary to protect this right since, "[a]s a practical matter, \* \* \* no one [other than the target] will question compliance with the *Powell* standards as to those subpoenas" (*ibid.*). The court added that third-party recipients of agency process "appear to lack standing to require an agency to conduct its investigation of a target consistently with *Powell*" (*ibid.*).

For several reasons, the court of appeals' reading of *Powell* is unsupportable.<sup>28</sup> First, *Powell* neither related to nor discussed third-party subpoenas. *Powell* did not address the "rights" of "targets." Indeed, *Powell* analogized administrative investigations to grand jury inquiries (379 U.S. at 57), the "targets" of which have no right to notice of subpoenas issued to others. See *Hannah v. Larche*, 363 U.S. at 449; *PepsiCo., Inc. v. SEC*, 563 F. Supp. 828, 831 (S.D.N.Y. 1983) (observing that *Powell* did not address "the power of a federal court to compel notice to an SEC target").

Second, *Powell* concerned the rights of a *recipient* of a summons, not the rights of a "target." The recipient of an IRS summons plainly has a right to question the Service's compliance with *Powell* before he turns over his records pursuant to the summons. Thus, the court of appeals was wrong in asserting (Pet. App. 7a) that "[t]hird-party recipients of agency process appear to lack standing to require an agency to conduct its investigation of a target consistently with *Powell*."<sup>29</sup>

---

U.S. 519, 524, 543-546 (1978); *FCC v. Schreiber*, 381 U.S. at 290-291.

<sup>28</sup> As the judges dissenting from the denial of rehearing en banc aptly stated (*id.* at 26a), the court's holding "goes beyond any reasonable interpretation of [*Powell*]."

<sup>29</sup> In support of this contention, the court of appeals cited (Pet. App. 7a) *Sierra Club v. Morton*, 405 U.S. 727, 733, 734-735 (1972), which concerned the "injury in fact" prong of the standing test. However, a person required to surrender documents in his possession would satisfy that standing requirement.

Third, the court of appeals' reading of *Powell* is at odds with this Court's subsequent decisions in *Donaldson* and *Miller*—decisions that did involve third-party summonses and the rights of "targets." In those decisions, this Court held that a "target" of an investigation has no right to question whether a summons directed to a third party should be judicially enforced. 400 U.S. at 521, 530-531; 425 U.S. at 446 n.9.<sup>30</sup>

In *Donaldson*, a taxpayer under investigation by the IRS sought to intervene in summons enforcement proceedings against third parties and argued that various requirements of *Powell* had not been met (see 400 U.S. at 521). The Court noted (*id.* at 531) that the records at issue would not be subject to suppression if the government obtained them "by other routine means, such as [a third party's] independent and voluntary disclosure prior to trial \* \* \* or through [a third party's] appearance as a trial witness, or by subpoena of the records for trial." The Court concluded (*ibid.*) that the taxpayer did not have "a significantly protectable interest" in the records and therefore lacked the right to intervene. Certainly, a "target" who has no right to block voluntary disclosure of third-party records prior to trial, no right to preclude the admission of such records as evidence in a trial, and no right to intervene in summons enforcement proceedings involving such records has no enforceable "right to be investigated consistently with the *Powell* standards."

Fourth, *Powell* did not create procedures to be followed by the Internal Revenue Service in its investigations. *Powell* merely interpreted the statutory showing required where the Service seeks judicial assistance to enforce a summons. In the present case, by contrast, the court of appeals did not interpret procedures mandated by Congress but created procedures that are fundamentally at odds

---

<sup>30</sup> The court of appeals dismissed *Donaldson* and *Miller* as being "irrelevant to the present case" (Pet. App. 6a-7a). But these decisions, and not *Powell*, deal with and define the "target's" rights with respect to information held by third parties.

with Congress's intent. See pages 16-23, *supra*. Nothing in *Powell* supports such judicial interference with agency procedures, particularly where the agency has not even sought to invoke judicial assistance.

Finally, *Powell* construed provisions of the Internal Revenue Code,<sup>31</sup> and the Code clearly did not require notice of a third-party summons.<sup>32</sup> The court of appeals therefore had no basis to interpret *Powell*—a decision interpreting a statute that did not require notice to “targets”—to bolster its judicially devised notice requirement.

---

<sup>31</sup> Since *Powell* construed the Internal Revenue Code, rather than the securities laws, it is not directly applicable to the Commission. Some elements of the showing required under *Powell*, however, appear to overlap applicable Fourth Amendment standards (see *United States v. Miller*, 425 U.S. at 445-446). Since it is not an issue in this case, we do not discuss the precise extent to which the *Powell* standards apply to the Commission. We do note, however, that they do not necessarily apply to the same extent as they do to the IRS. See *In re EEOC*, 709 F.2d 392, 398 n.2 (5th Cir. 1983); *United States v. Thriftyman, Inc.*, 704 F.2d 1240, 1244-1245 (Temp. Emer. Ct. App. 1983); *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1377-1378 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980).

<sup>32</sup> Congress subsequently amended the tax laws to require the IRS to give a taxpayer notice of summonses directed to certain statutorily-defined “third-party recordkeepers” because “there [was] no legal requirement that the taxpayer (or other party) to whose business or transactions the summoned records relate be informed that a third-party summons has been served.” S. Rep. 94-938 (Pt. 1), 94th Cong., 2d Sess. 368 (1976). See 26 U.S.C. 7609(3). See also *Kelley v. United States*, 536 F.2d 897, 899 (9th Cir. 1976), cert. denied, 429 U.S. 1047 (1977); *Scarsfotti v. Shea*, 456 F.2d 1052, 1053 (10th Cir. 1972); *In re Cole*, 342 F.2d 5, 8 (2d Cir.), cert. denied, 381 U.S. 950 (1965). Even after this amendment, a taxpayer is still not entitled to notice of or the opportunity to challenge an IRS summons directed to a third party who is not a “third-party recordkeeper” as defined by the Act. *United States v. Schutterle*, 586 F.2d 1201, 1204 (8th Cir. 1978).

**B. The Court Of Appeals' Notice Requirement Will Cause Serious Problems For Law Enforcement That Congress Could Not Have Intended**

Any lingering uncertainty about Congress's intent is dispelled by the adverse consequences that the court of appeals' notice requirement is certain to produce. The court of appeals' notice requirement will provide "targets" with a potent new weapon for use in obstructing and delaying important investigations. "Experience and common sense \* \* \* establish that such a [requirement will] be greatly abused \* \* \*." *PepsiCo., Inc. v. SEC*, 563 F. Supp. 828, 832 (S.D.N.Y. 1983).

1. Notice will provide "targets" with a road map of the investigation and a status report on its progress and direction. It will thereby substantially increase a "target's" opportunities to destroy documents, tailor testimony, fabricate defenses, and transfer stolen assets or securities beyond the reach of the government and injured investors. See *United States v. Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 5; *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-219 (1979); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239 (1978). Furthermore, "targets" might bribe witnesses or threaten them with physical or economic retaliation in an effort to persuade them not to testify, to mold their testimony, or to commit perjury. *Ibid.* Witnesses who are employees or business associates of those under investigation are particularly vulnerable to such coercion. See *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 222; *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 239. And confidential informants, whose cooperation with the government is often not known to the "target," will be reluctant to come forward and testify if they know that their participation will be revealed to the "target." See *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 219; *Pet.*

App. 26a (Kennedy, J., dissenting from the denial of rehearing en banc).<sup>33</sup>

The threat of such activities has served as the basis for legislation to preserve the secrecy of agency investigations<sup>34</sup> and underlies the longstanding provision for secrecy in grand jury proceedings. See *United States v. Sells Engineering, Inc.*, slip op. 5; *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 218-219; *United States v. Proctor & Gamble*, 356 U.S. 677, 681 (1958); Fed. R. Crim. P. 6(e). "Targets" of grand jury proceedings have no right to notice of the identities of persons subpoenaed to testify,<sup>35</sup> and "targets" of Commission investigations likewise should not be given such a right.<sup>36</sup>

---

<sup>33</sup> Notice also would needlessly expose innocent witnesses and subjects to prejudicial publicity. A witness's participation in an investigation could lead to unfair speculation that he is suspected of wrongdoing. Cf. *United States v. Sells Engineering Inc.*, No. 81-1032 (June 30, 1983), slip op. 5; *Illinois v. Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983), slip op. 5 n.8. Congress has recognized these privacy interests in the Freedom of Information Act. See 5 U.S.C. 552(b) (7) (C); *FBI v. Abramson*, 456 U.S. 615 (1982). Furthermore, premature disclosure of Commission investigations of companies could adversely affect the prices of securities.

<sup>34</sup> When Congress enacted the Administrative Procedure Act, it authorized administrative agencies to withhold transcripts of investigative testimony if their release might interfere with an investigation. See Section 6(b) of the Administrative Procedure Act, ch. 324, 60 Stat. 240, now recodified at 5 U.S.C. 555(c); S. Rep. 752, 79th Cong., 1st Sess. (1945); H.R. Rep. 1980, 79th Cong., 2d Sess. (1946); *Commercial Capital Corp. v. SEC*, 360 F.2d 856, 858 (7th Cir. 1966). And in enacting the Freedom of Information and Privacy Acts, Congress created an exemption for information contained in active law enforcement investigative files. See 5 U.S.C. 552(b) (7) (A); 5 U.S.C. 552a(k) (2).

<sup>35</sup> See *United States v. Bright*, 630 F.2d 804, 811 (5th Cir. 1980); *SEC v. Dresser Industries, Inc.*, 628 F.2d at 1382; *Archer v. United States*, 393 F.2d 124, 125-126 (5th Cir. 1968).

<sup>36</sup> Respondent O'Brien argues (Br. in Opp. 25-33) that Commission investigatory subpoenas are distinguishable from grand jury

As this Court has expressly recognized, agency investigations, such as those conducted by the Commission, are analogous to grand jury proceedings in many respects, including their need for secrecy.<sup>37</sup>

2. Notice also will encourage needless litigation by arming "targets" with a tool to delay investigations and subsequent law enforcement proceedings. "Targets" might encourage witnesses not to comply with legitimate subpoenas, thereby forcing the agency to seek judicial enforcement in many instances in which it would not other-

subpoenas because they are not subject to the same restraints. Although the checks on Commission officers using subpoenas are different from those on prosecutors seeking grand jury subpoenas, the former are nevertheless substantial. First, as we have discussed, <sup>13</sup> pages 10-14, *supra*, the Commission retains close supervision and control of the use of its subpoena powers through, among other mechanisms, the formal order. Second, all Commission employees, including officers appointed to conduct investigations, must adhere to the Commission's Canons of Ethics, which include a prohibition against "participat[ion] in an investigation aimed at a particular individual for reasons of animus, prejudice or vindictiveness \* \* \*," 17 C.F.R. 200.66; see 17 C.F.R. 200.735-2(b) (requiring Commission employees to abide by Canons of Ethics). And, third, as already noted, Commission subpoenas are not self-executing. The Commission must apply to a federal district court to enforce compliance and, in such a proceeding, the respondent may raise any appropriate defenses.

Congress has noted these internal controls and has commended the Commission's "excellent record with respect to the use of its subpoena authority." H.R. Rep. 96-1321, 96th Cong., 2d Sess. 5 (1980). Thus, in practice, the Commission's control of subpoenas issued by its staff may greatly exceed the control by grand juries of subpoenas issued under their authority.

<sup>37</sup> *Hannah v. Larche*, 363 U.S. at 449 & n.30 (citing *Woolley v. United States*, 97 F.2d 258, 262 (9th Cir.), cert. denied, 305 U.S. 614 (1938), and *Consolidated Mines v. SEC*, 97 F.2d 704, 708 (9th Cir. 1938), in which courts of appeals likened SEC investigations to grand jury proceedings). See also *United States v. Powell*, 379 U.S. at 57; *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216 (1946).

wise be necessary.<sup>38</sup> Even if a witness desires to comply voluntarily with a subpoena, "targets" armed with advance notice can be expected to file frivolous actions to delay compliance.<sup>39</sup> In addition, under the rationale of the court of appeals (Pet. App. 7a), "targets" may seek to intervene in numerous subpoena enforcement proceedings for purposes of delay.<sup>40</sup> If intervention is allowed, "targets" could prolong subpoena enforcement proceedings by requesting discovery and evidentiary hearings.<sup>41</sup> In sum,

---

<sup>38</sup> As the district court observed in *PepsiCo*, "[o]ne could readily envision investigations in which several targets raise separate objections to each subpoena an agency serves." 563 F. Supp. at 832. Indeed, respondents' tactics in this investigation demonstrate the pernicious effects that may result from notice (see pages 3-6, *supra*).

<sup>39</sup> See *Sprecher v. Graber*, 716 F.2d 968, 971 (2d Cir. 1983) (opposition to SEC subpoena was "frivolous and interposed solely for delay"); *Atlantic Richfield Co. v. FTC*, 546 F.2d 646, 647 (5th Cir. 1977).

<sup>40</sup> See, e.g., *Donaldson v. United States*, 400 U.S. 517 (1971); *Reisman v. Caplin*, 375 U.S. 440 (1964); *FSLIC v. First National Development Corp.*, 497 F. Supp. 724, 729, 732 (S.D. Tex. 1980) (court found that motions to intervene in subpoena enforcement action were "primarily motivated by [movants'] desire to impede the FSLIC investigation").

<sup>41</sup> In this Court, respondent O'Brien suggests that the Commission's concerns about delay are speculative since "subpoena-enforcement actions are summary proceedings" (Br. in Opp. 18). But, in the court of appeals, respondent argued that a person challenging a Commission subpoena may be entitled to discovery and an evidentiary hearing (O'Brien Reply Br. 5-6). Although some courts have held that evidentiary hearings are appropriate only after the person seeking such a hearing has made a factual showing that the subpoena was issued for an invalid purpose (see *SEC v. Knopfler*, 658 F.2d 25, 26 (2d Cir. 1981), cert. denied, 455 U.S. 908 (1982); *SEC v. Howatt*, 525 F.2d 226, 229 (1st Cir. 1975)), other courts have held that evidentiary hearings are more readily available. See, e.g., *United States v. Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States v. Garden State National Bank*, 607 F.2d 61 (3d Cir. 1979); *United States v. Church of Scientology*, 520 F.2d 818 (9th Cir. 1975). Moreover, experience demonstrates that subpoena enforcement actions are not always re-



the court of appeals' holding encourages the use of the federal judicial system for dilatory purposes.

Even if a "target's" challenges to third-party subpoenas are ultimately unsuccessful, he may nevertheless achieve his broader objective of derailing the Commission's investigation. Delay is particularly inimical to the Commission's ability to act promptly to protect the integrity of the nation's securities markets from manipulation and other misconduct.<sup>42</sup> Delay may also preclude referral of a matter to the Department of Justice at the conclusion of an investigation because of statutes of limitations on criminal prosecutions.

Moreover, if the Commission were required to respond to such challenges, it "would be diverted from [its] legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable." *Hannah v. Larche*, 363 U.S. at 443; cf. *FTC v. Standard Oil Co.*, 449 U.S. at 242; *Donaldson v. United States*, 400 U.S. at 529. As one district court stated in rejecting the court of appeals' decision in this case,

the limited resources presently available in our agencies to enforce the nation's public policies would be significantly reduced because of procedural maneuvering and other even less wholesome tactics.

*PepsiCo, Inc. v. SEC*, 563 F. Supp. at 832.

3. The requirement that persons under inquiry receive notice of subpoenas issued to witnesses also would inject

---

solved quickly. See, e.g., *Penfield Co. v. SEC*, 330 U.S. 585, 592 (1947) (finding that witness's refusal to comply with Commission subpoena evidenced a "long, persistent effort to defeat the investigation").

<sup>42</sup> Congress has recognized that the Commission must be able to move promptly to prevent manipulation of the securities markets. H.R. Rep. 96-1321 (Pt. 1), at 8 (footnote omitted). See also *SEC v. Dresser Industries, Inc.*, 628 F.2d at 1377.



substantial uncertainty into law enforcement and jeopardize pending investigations. Although it required notice to "targets" when third-party subpoenas are served, the court of appeals made no effort to resolve such fundamental questions as the definition of a "target," the procedures for determining whether a person or firm is a "target," the rights of "targets" following receipt of notice, and the effect of noncompliance with the notice requirement. See *PepsiCo, Inc. v. SEC*, 563 F. Supp. at 832. Even the threshold question—what is a "target"?—is far from clear. The Commission's statutes and rules do not use that term. There are, of course, investigations in which specific entities or persons are suspect, but the Commission's inquiries often focus on transactions rather than individuals.<sup>43</sup> Is a "target" any person or firm about whose activities information is gathered? As the investigation gradually develops facts, is it anyone who starts to come into focus as a possible law violator? Is it anyone suspected by the Commission staff? ~~It is~~ anyone against whom sufficient evidence has been received to permit the initiation of administrative proceedings? Or the filing of an injunctive action? Or referral of the case for criminal prosecution? Is it

---

<sup>43</sup> For example, the Commission may investigate unusual trading preceding the announcement of a tender offer for the purpose of determining whether someone traded with advance knowledge of the tender offer in violation of antifraud provisions of the securities laws. In such a case, the Commission might not know which of the thousands of traders who purchased stock of the target company in the days prior to the announcement may be potential subjects. And, in some such cases, the Commission is required to file an enforcement action before identifying all culpable persons. See, e.g., *SEC v. Certain Unknown Purchasers of the Common Stock of, and Call Options for, the Common Stock of Santa Fe Int'l Corp.*, No. 81 Civ 6553 (WCC) (S.D.N.Y. Nov. 13, 1981) (freezing assets in bank accounts); *SEC v. Musella*, No. 83 Civ 342 (CSH) (S.D.N.Y. Jan. 19, 1984) (preliminary injunction and temporary freeze of profits of alleged insider trading against defendant not identified until several months after complaint filed).

And how are the courts to proceed when a party who has not received notice but claims to be a "target" seeks intervention in enforcement proceedings or initiates one of the "other appropriate district court proceedings" to which the court of appeals referred (Pet. App. 7a)? Must the Commission disclose the evidence it has gathered so that its decision not to provide "target" notice can be reviewed? Is that judgment to be revisited as the investigation continues and more evidence is received? While these and other issues are being resolved on a case-by-case basis, numerous Commission and other law enforcement investigations may be at risk. And needless to say, the resolution of these issues would require an extensive commitment of federal judicial resources.

4. These fears are not speculative. As a result of the court of appeals' decision, the Commission's investigations already have been seriously disrupted. The Commission has postponed many investigations in the states comprising the Ninth Circuit<sup>44</sup> and modified the scope of others. In one instance, the Commission's inability to determine how to apply the decision compelled it to give *public* notice of all subpoenas rather than running the risk of having its investigation compromised by litigation alleging that it failed to provide notice to all "targets."<sup>45</sup>

In addition, "[t]here is no principled basis for confining the [court of appeals'] holding to the context of an SEC investigation. It threatens to compromise govern-

---

<sup>44</sup> Notwithstanding its stay of the mandate pending this Court's review, the court of appeals has held that its *O'Brien* decision has *stare decisis* effect in district courts in the Ninth Circuit. *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923, 928 (1983) (Pet. App. 30a).

<sup>45</sup> *In re Transactions in Washington Public Power Supply System Securities*, No. HO-1556 (SEC Jan. 11, 1984) (Order directing private investigation and designating officers to take testimony). 49 Fed. Reg. 2035 (1984). While this type of proceeding ensures that all interested persons—including "targets" however defined—will have notice of subpoenas, it deprives witnesses of the confidentiality that those who testify in Commission investigations normally enjoy.

ment investigations by most agencies" (Pet. App. 26a). See *PepsiCo, Inc. v. SEC*, 563 F. Supp. at 832.<sup>46</sup> More than 100 federal law enforcement and other programs depend upon subpoenas that are issued, without notice to "targets," pursuant to statutes analogous to the Commission's. See Pet. 18-25; *Hannah v. Larche*, 363 U.S. at 427. Like the Commission, these agencies must seek judicial enforcement of their subpoenas. See *id.* at 427 n.9. Thus, the court of appeals' rationale would appear to be applicable to virtually all law enforcement agencies that issue investigative subpoenas without third-party notice.

5. In sum, it is most unlikely that Congress intended to impose a notice requirement that would have such obvious and deleterious consequences. At the very least, Congress could be expected to give serious consideration to the danger of such consequences before insisting upon notice to "targets." However, with the exception of Section 21(h) of the Securities Exchange Act and the RFPA, which contain a narrow, carefully crafted notice requirement, there is no evidence that Congress ever considered the consequences of providing "targets" with notice of third-party subpoenas. It would be unwarranted to "infer that Congress has exercised such a power without affirmatively expressing its intent to do so." *Illinois v. Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983), slip op. 14.

---

<sup>46</sup> The court of appeals' decision already has been relied upon to challenge law enforcement investigations of other agencies. See, e.g., *Alaska Teamster-Employer Pension Trust v. Donovan*, No. C-83-4636-RPA (N.D. Cal. filed Oct. 3, 1983) (challenging lawfulness of Department of Labor investigative subpoenas issued without prior notice); *Kahn v. Phillips*, No. 84-0346 (D.D.C. filed Feb. 1, 1984) (action to enjoin Commodity Futures Trading Commission administrative proceeding based on agency's failure to give notice of subpoena issued in underlying investigation).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE

*Solicitor General*

KENNETH S. GELLER

*Deputy Solicitor General*

DANIEL L. GOELZER

*General Counsel*

SAMUEL A. ALITO, JR.

*Assistant to the Solicitor General*

PAUL GONSON

*Solicitor*

LINDA D. FIENBERG

*Associate General Counsel*

LARRY R. LAVOIE

*Assistant General Counsel*

HARRY J. WEISS

*Special Trial Counsel*

RUTH E. EISENBERG

*Special Counsel*

ELIZABETH A. SPURLOCK

*Attorney*

*Securities and Exchange Commission*

FEBRUARY 1984

**ADDENDUM**

Section 21(h) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(h) provides:

(1) The Right to Financial Privacy Act of 1978 shall apply with respect to the Commission, except as otherwise provided in this subsection.

(2) Notwithstanding section 1105 or 1107 of the Right to Financial Privacy Act of 1978, the Commission may have access to and obtain copies of, or the information contained in financial records of a customer from a financial institution without prior notice to the customer upon an ex parte showing to an appropriate United States district court that the Commission seeks such financial records pursuant to a subpoena issued in conformity with the requirements of section 19(b) of the Securities Act of 1933, section 21(b) of the Securities Exchange Act of 1934, section 18(c) of the Public Utility Holding Company Act of 1935, section 42(b) of the Investment Company Act of 1940, or section 209(b) of the Investment Advisers Act of 1940, and that the Commission has reason to believe that—

(A) a delay in obtaining access to such financial records, or the required notice, will result in—

- (i) flight from prosecution;
- (ii) destruction of or tampering with evidence;
- (iii) transfer of assets or records outside the territorial limits of the United States;
- (iv) improper conversion of investor assets; or
- (v) impeding the ability of the Commission to identify or trace the source or disposition of funds involved in any securities transaction;

(B) such financial records are necessary to identify or trace the record or beneficial ownership interest in any security;

(C) the acts, practices or course of conduct under investigation involve—

- (i) the dissemination of materially false or misleading information concerning any security, issuer, or market, or by the failure to make disclosures required under the securities law, which remain uncorrected; or
- (ii) a financial loss to investors or other persons protected under the securities laws which remains substantially uncompensated; or

(D) the acts, practices or course of conduct under investigation—

- (i) involve significant financial speculation in securities; or
- (ii) endanger the stability of any financial or investment intermediary.

(3) Any application under paragraph (2) for a delay in notice shall be made with reasonable specificity.

(4) (A) Upon a showing described in paragraph (2), the presiding judge or magistrate shall enter an ex parte order granting the requested delay for a period not to exceed ninety days and an order prohibiting the financial institution involved from disclosing that records have been obtained or that a request for records has been made.

(B) Extensions of the period of delay of notice provided in subparagraph (A) of up to ninety days each may be granted by the court upon application, but only in accordance with this subsection or section 1109(a), (b) (1), or (b) (2) of the Right to Financial Privacy Act of 1978.

(C) Upon expiration of the period of delay of notification ordered under subparagraph (A) or (B), the customer shall be served with or mailed a copy of the subpoena insofar as it applies to the customer together with the following notice which shall prescribe with rea-

sonable specificity the nature of the investigation for which the Commission sought the financial records:

"Records or information concerning your transactions which are held by the financial institutions named in the attached subpoena were supplied to the Securities and Exchange Commission on (date), Notification was, withheld pursuant to a determination by the (title of court so ordering) under Section 21(h) of the Securities Exchange Act of 1934 that (state reason). The purpose of the investigation or official proceeding was (state purpose)."

(5) Upon application by the Commission, all proceedings pursuant to paragraphs (2) and (4) shall be held in camera and the records thereof sealed until expiration of the period of delay or such other date as the presiding judge or magistrate may permit.

(6) The Commission shall compile an annual tabulation of the occasions on which the Commission used each separate subparagraph or clause of paragraph (2) of this subsection or the provisions of the Right to Financial Privacy Act of 1978 to obtain access to financial records of a customer and include it in its annual report to the Congress. Section 1121(b) of the Right to Financial Privacy Act of 1978 shall not apply with respect to the Commission.

(7) (A) Following the expiration of the period of delay of notification ordered by the court pursuant to paragraph (4) of this subsection, the customer may, upon motion, reopen the proceeding in the district court which issued the order. If the presiding judge or magistrate finds that the movant is the customer to whom the records obtained by the Commission pertain, and that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), it may order that the customer be granted civil penalties against the Commission in an amount of equal to the sum of—

- (i) \$100 without regard to the volume of records involved;
- (ii) any out-of-pocket damages sustained by the customer as a direct result of the disclosure; and
- (iii) if the violation is found to have been willful, intentional, and without good faith, such punitive damages as the court may allow, together with the costs of the action and reasonable attorney's fees as determined by the court.

(B) Upon a finding that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), the court, in its discretion, may also or in the alternative issue injunctive relief to require the Commission to comply with this subsection with respect to any subpoena which the Commission issues in the future for financial records of such customer for purposes of the same investigation.

(C) Whenever the court determines that the Commission has failed to comply with this subsection, other than paragraph (1), and the court finds that the circumstances raise questions of whether an officer or employee of the Commission acted in a willful and intentional manner and without good faith with respect to the violation, the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. After investigating and considering the evidence submitted, the Office of Personnel Management shall submit its findings and recommendations to the Commission and shall send copies of the findings and recommendations to the officer or employee or his representative. The Commission shall take the corrective action that the Office of Personnel Management recommends.

(8) The relief described in paragraphs (7) and (10) shall be the only remedies or sanctions available to a



customer for a violation of this subsection, other than paragraph (1), and nothing herein or in the Right to Financial Privacy Act of 1978 shall be deemed to prohibit the use of any investigation or proceeding of financial records, or the information contained therein obtained by a subpoena issued by the Commission. In the case of an unsuccessful action under paragraph (7), the court shall award the costs of the action and attorney's fees to the Commission if the presiding judge or magistrate finds that the customer's claims were made in bad faith.

(9) (A) The Commission may transfer financial records or the information contained therein to any government authority if the Commission proceeds as a transferring agency in accordance with section 1112 of the Right to Financial Privacy Act of 1978, except that the customer notice required under section 1112(b) or (c) of such Act may be delayed upon a showing by the Commission, in accordance with the procedure set forth in paragraphs (4) and (5), that one or more of subparagraphs (A) through (D) of paragraph (2) apply.

(B) The Commission may, without notice to the customer pursuant to section 1112 of the Right to Financial Privacy Act of 1978, transfer financial records or the information contained therein to a State securities agency or to the Department of Justice. Financial records or information transferred by the Commission to the Department of Justice or to a State securities agency pursuant to the provisions of this subparagraph may be used only in an administrative, civil, or criminal action or investigation by Department of Justice or the State securities agency which arises out of or relates to the acts, practices, or courses of conduct investigated by the Commission, except that if the Department of Justice or the State securities agency determines that the information should be disclosed or used for any other purpose, it may do so if it notifies the customer, except as otherwise provided in the Right to Financial Privacy Act of 1978,

within 30 days of its determination, or complies with the requirements of section 1109 of such Act regarding delay of notice.

(10) Any government authority violating paragraph (9) shall be subject to the procedures and penalties applicable to the Commission under paragraph (7) (A) with respect to a violation by the Commission in obtaining financial records.

(11) Notwithstanding the provisions of this subsection, the Commission may obtain financial records from a financial institution or transfer such records in accordance with provisions of the Right to Financial Privacy Act of 1978.

(12) Nothing in this subsection shall enlarge or restrict any rights of a financial institution to challenge requests for records made by the Commission under existing law. Nothing in this subsection shall entitle a customer to assert any rights of a financial institution.

(13) Unless the context otherwise requires, all terms defined in the Right to Financial Privacy Act of 1978 which are common to this subsection shall have the same meaning as in such Act.

**CORRECTED COPY**

No. 83-751

Supreme Court, U.S.  
FILED

MAR 24 1984

ALEXANDER L. COTY JR.  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1983

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
*Petitioners,*

v.

JERRY T. O'BRIEN, INC., ET AL.,  
*Respondents*

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS  
JERRY T. O'BRIEN, INC., JERRY T. O'BRIEN,  
PENNALUNA & COMPANY, INC.,  
AND BENJAMIN A. HARRISON

LeSOURD & PATTEN  
C. DEAN LITTLE  
D. WILLIAM TOONE

Attorneys for Respondents  
Jerry T. O'Brien, Inc.,  
Jerry T. O'Brien,  
Pennaluna & Company, Inc.,  
and Benjamin A. Harrison

3900 Seattle-First National  
Bank Building  
Seattle, Washington 98154  
(206) 624-1040

(Corrected Copy)

**QUESTIONS PRESENTED**

Whether the respondents, who are targets of an SEC investigation, should be given notice of administrative subpoenas issued to third parties.

## **PARTIES TO THE PROCEEDING**

Respondent Jerry T. O'Brien, Inc., is a securities broker-dealer with offices in Wallace, Kellogg, and Coeur d'Alene, Idaho, and Spokane, Washington. Its principal shareholder and chief officer is respondent Jerry T. O'Brien. (Hereafter these respondents shall be referred to as "O'Brien".)

Respondent Benjamin A. Harrison is sole shareholder of respondent Pennaluna & Company, Inc., a private investment company of Mr. Harrison. Prior to June, 1970, Pennaluna & Company, Inc., was a securities broker-dealer; it now licenses its name to respondent O'Brien. Mr. Harrison is an employee of Jerry T. O'Brien, Inc., and is also secretary of the Spokane Stock Exchange, a national securities exchange. (Hereafter these respondents shall be referred to as "Harrison".)

Co-respondent H. F. Magnuson & Company is the accountant for Jerry T. O'Brien, Inc., and for Pennaluna & Company, Inc. Co-respondent H. F. Magnuson is also a customer of Jerry T. O'Brien, Inc. (Hereafter these respondents shall be referred to as "Magnuson" or as "co-respondents".)

Respondents Jerry T. O'Brien, Inc., and Pennaluna & Company, Inc., have no parent, subsidiary, or affiliate corporations.

## TABLE OF CONTENTS

STATEMENT .....	1
A. Complaint of Respondents .....	1
B. Respondents' Motion for Discovery; SEC's Motion to Dismiss .....	3
C. District Court Order of January 20, 1982 ....	4
D. District Court Order of March 25, 1982 .....	6
E. Order of Ninth Circuit Court of Appeals ....	7
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	10
I. Pursuant To <i>Reisman v. Caplin</i> , A Target's Remedy For SEC Abuse Of Authority In Issuance Of A Third-Party Subpoena Is The Target's Op- portunity To Move To Intervene In The Subpoena Enforcement Action .....	10
A. An SEC Subpoena Must Be Issued As Authorized By Law .....	10
B. An SEC Third-Party Subpoena Is Subject To Challenge By The Target Of Investigation .	12
C. An SEC Third-Party Subpoena Is Subject To Challenge By A Target On Grounds That Its Issuance Violates <i>Powell</i> Standards .....	12
D. An SEC Third-Party Subpoena Issued In Ex- cess Or Abuse Of Authority Violates A Target's Interests .....	14
E. A Target's Remedy For SEC Issuance Of An Unauthorized Third-Party Subpoena Is Op- portunity To Move To Intervene In The Sub- poena Enforcement Action .....	16

I I. The Target Must Have Notice Of The Issuance Of A Third-Party Subpoena If The Target's <i>Reisman</i> Remedy Is To Be Effective .....	17
A. A Target's Remedy For SEC Issuance Of An Unauthorized Third-Party Subpoena Necessitates Notice .....	17
B. A Target Has No Remedy In Suppression Of Evidence .....	19
C. The SEC Is Not A Grand Jury And Has No Inherent Right To Investigate Without Notice .....	20
D. Congress Has Not Precluded Notice To Targets .....	22
E. The Courts Have Power To Effectuate The <i>Reisman</i> Remedy .....	25
F. Notice To A Target Occasions No More De- lay Than Is That Inherent In Existing Pro- cedures .....	26
G. In Any Event, A Target Should Be Granted Notice Of Third-Party Subpoenas When The SEC Fails To Show <i>Powell</i> Standards Or When The Target Shows Proper Cir- cumstances .....	28
CONCLUSION .....	31

## TABLES OF AUTHORITY

## Table of Cases

<i>Cudahy Packing Co. v. Holland</i> , 315 U.S. 357 (1942)	8,18
<i>Donaldson v. United States</i> , 400 U.S. 517 (1971)	13,14,15,16,17,
<i>FCC v. Schreiber</i> , 381 U.S. 279	26
<i>Gumbel v. Pitkin</i> , 124 U.S. 131 (1888)	26
<i>Hannah v. Larche</i> , 363 U.S. 420 (1960)	22,28
<i>Hecht v. Bowles</i> , 321 U.S. 321 (1944)	26
<i>Lynn v. Biderman</i> , 536 F.2d 820 (9th Cir. 1976), <i>cert. den.</i> , 429 U.S. 920	3,29
<i>Oklahoma Press Publishing Co. v. Walling</i> , 327 U.S. 186 (1946)	9,14,15,22,25-26,
<i>Reisman v. Caplin</i> , 375 U.S. 440 (1964)	<i>passim</i>
<i>Saunders v. Schweiker</i> , 508 F. Supp. 305 (D.C.N.Y. 1981)	16
<i>SEC v. Csapo</i> , 533 F.2d 7 (D.C. Cir. 1976)	26
<i>SEC v. ESM Government Securities, Inc.</i> , 645 F.2d 310 (5th Cir. 1981)	2,19,21
<i>SEC v. Howatt</i> , 525 F.2d 226 (1st Cir. 1975)	29
<i>SEC v. Knopfler</i> , 658 F.2d 25 (2d Cir. 1981), <i>cert. den.</i> , 455 U.S. 908 (1982)	29
<i>SEC v. Laird</i> , 598 F.2d 1162 (9th Cir. 1979)	19
<i>SEC v. Magnuson et al.</i> , W.D. Wash. No. C-82-362, E.D. Wash. No. C-82-282	6
<i>SEC v. Wheeling-Pittsburgh Steel Corp.</i> , 648 F.2d 118 (3d Cir. 1981)	2,5,29
<i>Silver King Mines, Inc. v. Cohen</i> , 261 F. Supp. 666 (D.C. Utah 1966)	3
<i>United States ex. re. Accardi v. Shaughnessy</i> , 347 U.S. 260 (1954)	2



<i>United States v. Bisceglia</i> , 420 U.S. 141 (1975) .	2,3,12,22
<i>United States v. Calandra</i> , 414 U.S. 338 (1974) . . . . .	20
<i>United States v. Church of Scientology</i> , 520 F.2d 818 (9th Cir. 1975) . . . . .	29
<i>United States v. Dauphin Deposit Trust</i> , 385 F.2d 129 (CA3 1967) . . . . .	12
<i>United States v. Fensterwald</i> , 553 F.2d 231 (D.C. Cir. 1977) . . . . .	29
<i>United States v. Friedman</i> , 532 F.2d 929 (3d Cir. 1976) . . . . .	19
<i>United States v. Genser</i> , 582 F.2d 292 (3d Cir. 1978) . . . . .	15,17,19
<i>United States v. Janis</i> , 428 U.S. 433 (1976) . . . . .	20
<i>United States v. Kis</i> , 658 F.2d 526 (7th Cir. 1981), <i>cert.</i> <i>den.</i> , 455 U.S. 1018 (1982) . . . . .	29
<i>United States v. LaSalle</i> , 437 U.S. 298 (1978) . . . . .	11,13,15,16,26
<i>United States v. Matras</i> , 487 F.2d 1271 (CA8 1973) . .	12
<i>United States v. McCarty</i> , 514 F.2d 368 (3d Cir. 1975)	29
<i>United States v. Minker</i> , 350 U.S. 179 (1956) . . . . .	18
<i>United States v. National State Bank</i> , 454 F.2d 1249 (7th Cir. 1972) . . . . .	29
<i>United States v. Powell</i> , 379 U.S. 48 (1964) . . . . .	passim
<i>United States v. Pritchard</i> , 438 F.2d 969 (CA5 1971)	12
<i>United States v. Salter</i> , 432 F.2d 697 (1st Cir. 1970)	29
<i>United States v. Samuels, Kramer &amp; Co.</i> , 712 F.2d 1342 (9th Cir. 1983) . . . . .	29,30
<i>United States v. Sells Engineering</i> , ____ U.S. ____, 77 L. Ed. 2d 743 (1983) . . . . .	10,21,22
<i>United States v. Theodore</i> , 479 F.2d 749 (CA4 1973) . .	12
<i>United States v. Turner</i> , 480 F.2d 272 (7th Cir. 1973)	29

<i>United States v. Wright Motor Co.</i> , 536 F.2d 1090 (5th Cir. 1976) .....	29
<i>Weinberger v. Romero-Barcelo</i> , 456 U.S. 305 (1982) ...	26

### Constitutional Provisions

U.S. Const. Amend. IV .....	15
-----------------------------	----

### Statutes

#### *Administrative Procedure Act*

5 U.S.C. § 555(c) .....	11-12
-------------------------	-------

#### *Right to Financial Privacy Act*

12 U.S.C. § 3401 .....	24
12 U.S.C. § 3402 .....	24
12 U.S.C. § 3403 .....	24
12 U.S.C. § 3405 .....	24, 25
12 U.S.C. § 3413 .....	24

#### *Securities Act of 1933*

§ 19(b), 15 U.S.C. § 77(s)(b) .....	2, 10
§ 20(a), 15 U.S.C. § 77(t)(a) .....	2, 10, 15
§ 22(b), 15 U.S.C. § 77(v)(b) .....	10

#### *Securities Exchange Act of 1934*

§ 9(a) (2), 15 U.S.C. § 78i(a)(2) .....	2
§ 15(b)(6), 15 U.S.C. § 78o(b)(6) .....	2
§ 21(a), 15 U.S.C. § 78u(a) .....	2, 10
§ 21(b), 15 U.S.C. § 78u(b) .....	10
§ 21(c), 15 U.S.C. § 78u(c) .....	10

#### *Internal Revenue Code*

26 U.S.C. § 7602 .....	15
------------------------	----

	<i>Page</i>
26 U.S.C. § 7609 .....	23,24
26 U.S.C. § 7609(a) .....	24
26 U.S.C. § 7609(b)(1) .....	23,24
26 U.S.C. § 7609(b)(2)(A) .....	23
26 U.S.C. § 7609(d) .....	23

### Rules and Regulations

#### *SEC Rules of Practice*

Rule 202.5, 17 C.F.R. 202.5 .....	2,15
Fed. R. Criminal Procedure 6(e) .....	21

### Other Authority

H. Bloomenthal, Vol. 3, <i>Securities Law Series</i> , <i>Securities and Federal Corporate Law</i> , § 1.12[4] at 1-50.14 .....	22
H.R. Rep. 94-658, 94th Cong., 2d Sess. 307 (1976) ....	24
H.R. Rep. No. 95-1383, 95 Cong. 2d Sess. 219 (1978) ..	24
H.R. Rep. 96-1321, 96th Cong., 2d Sess. 2 (1980) .....	2
H.R. Rep. 309, 4 U.S. Code Cong. and Admin. News 3205 .....	24
James W. Ruddy, <i>Freedom of Information Act</i> , Release No. 34 (Oct. 20, 1975), 8 S.E.C. Doc. 193 (Nov. 5, 1975) .....	22
SEC 48th Annual Report 1982, p.1 .....	20
SEC 1981 Enforcement Training Manual, pp. 1-28 ..	2
Sen. Rep. No. 94-938, 94th Cong., 2d Sess. 368-371 .....	24
Sen. Rep. No. 95-1273, 95th Cong. 2d Sess. 219 (1978) .....	24

IN THE  
**Supreme Court of the United States**

---

October Term, 1983

---

No. 83-751

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
*Petitioners,*

v.

JERRY T. O'BRIEN, INC., ET AL.,  
*Respondents*

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

BRIEF OF RESPONDENTS  
JERRY T. O'BRIEN, INC., JERRY T. O'BRIEN,  
PENNALUNA & COMPANY, INC.,  
AND BENJAMIN A. HARRISON

---

STATEMENT

A. Complaint of Respondents.

Respondents are targets of an SEC investigation. Respondents Harrison and Pennaluna are specifically named in a Commission formal order of investigation S-1555 dated September 3, 1980. (RI, Ex. A) The formal order also names Magnuson and unspecified "others" as subjects of investigation. Respondent O'Brien is not named in the formal order. In February, 1981, after receipt of an SEC subpoena, O'Brien asserts that it was informed by SEC staff that it was not at that time a target of investigation. (R2.) In August, 1981, after complying with four SEC subpoenas, O'Brien was informed by SEC staff that it was a target; specifically, that it was one of the "others" referred to in the formal order. (R2, Ex. R.)

Respondents brought this action in September, 1981, seeking injunctive relief against investigatory conduct of the

SEC and its staff. Respondents allege that the agency's conduct has exceeded and abused statutory authority. Respondents also brought this action against co-respondent Magnuson, seeking to restrain its compliance with a subpoena issued to it pending court consideration of their claims. (R1.)

Respondents allege that the SEC is investigating O'Brien without prior determination by the Commission, in violation of statute and its own rules.<sup>1</sup> Respondents allege that the SEC deceived O'Brien into complying with four subpoenas by intentionally misleading it as to its status as a target.<sup>2</sup>

---

1. O'Brien is not named in the Commission's formal order of investigation S-1555. (R1, Ex. A.) In February 1981, O'Brien was informed he was not a target. (R2.) In August 1981, SEC staff informed O'Brien that he was being investigated for violations of Sections 9(a)(2) and 15(b)(6) of the Exchange Act, which are not specified in the Commission's formal order. (R2, Ex. R.) The formal order describes no extraordinary events tending to show violations by O'Brien. *United States v. Bisceglia*, 420 U.S. 141 (1975). Sections 20(a) and 19(b) of the Securities Act and Section 21(a) of the Exchange Act grant authority to the Commission to initiate investigations and to delegate subpoena power to designated staff. SEC Rule 202.5, 17 C.F.R. § 202.5, applicable at material times, required investigation of O'Brien only after a Commission determination of "likelihood" that a violation has been or is about to be committed. Any agency must scrupulously observe its own rules. *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Although the existing formal order refers to identified targets and "others", the term "others" is used by the SEC to refer to a target's officers, directors, and employees. SEC 1981 Enforcement Training Manual, p. 1-28. Congress intended a Commission decision to investigate: "Should the staff uncover information indicating the advisability of pursuing possible violations not embodied within the [existing] scope of the formal order, it must return to the Commission and seek an amendment to the order." H.R. Rep. No. 1321, 96th Cong. 2d Sess. 2 (1980) reprinted 4 U.S. Code Cong. and Admin. News 3877 n.2. The staff has not brought the matter of possible violations by O'Brien to the Commission's attention, and the Commission has given no approval to issuance of subpoenas for purpose of investigating O'Brien. See Pet. Brief p. 13 n.14, citing H.R. Rep. 96-1321 (Pt. 1), 96th Cong. 2d Sess. 4 n.2 (1980). O'Brien is entitled to a decision by the Commission itself. *SEC v. Wheeling Pittsburgh Steel Corp.*, 648 F.2d 118, 130 (3d Cir. 1981).

2. See *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310 (5th Cir. 1981).

Respondents allege that the SEC intentionally has provided nonpublic information about the formal order and subject matter of investigation to the news media in order to harass and injure respondents.<sup>3</sup> Respondents allege that the SEC has issued to them, and to third parties, subpoenas which demand disclosure of information irrelevant to any legitimate purpose.<sup>4</sup>

**B. Respondents' Motion for Discovery; SEC's Motion to Dismiss.**

On filing of their complaint, respondents also filed a motion for discovery supported by affidavits. Respondents argued that they had shown some evidence to support their allegations which inferred a reasonable possibility of SEC misconduct exceeding or abusing authority. Respondents indicated to the court that, since evidence necessary to prove their allegations was exclusively in the hands of the SEC and its agents, respondents needed discovery in order to prove their allegations. Respondents requested discovery, by analogy to the limited discovery ordered by courts in subpoena enforcement actions. (R30; R50, p. 22-25.)<sup>5</sup>

---

3. See *Silver King Mines, Inc., v. Cohen*, 261 F. Supp. 666 (D.C. Utah 1966); *Lynn v. Biderman*, 536 F.2d 820 (9th Cir. 1976), cert. den. 429 U.S. 920.

4. See *United States v. Bisceglia*, supra, 420 U.S. at 146-147 and footnote 11, *infra*.

5. See cases cited in footnote 23, *infra*. Petitioner's quotation of respondent's counsel at footnote 5 of its Brief (Pet. Brief p. 4) must be placed in this context. Few plaintiffs can prove any case without discovery. For example, the July newspaper article revealing specific details of the formal order and subject matter of investigation inferred a strong possibility of SEC misconduct. Since the reporter refused to reveal his source (Tr. 51), the SEC was the only source of evidence which would prove wrongdoing. Discovery has occurred in respondents' damage action against the SEC. Discovery has revealed that an SEC agent provided the investigatory information to a public relations employee of a corporation in a tender offer battle with respondent Magnuson, and encouraged the employee to reveal it to news media. (See Deposition of David Bond, May 11, 1983, p. 50.)

The SEC responded with a motion to dismiss. The SEC argued that dismissal of respondents' equitable claims was required under *Reisman v. Caplin*, 375 U.S. 440 (1964). The SEC asserted that respondents could raise their claims in a subpoena enforcement action, which under *Reisman* was an adequate remedy at law. (R42, p.11-14.) Respondents asserted that the *Reisman* remedy at law was not adequate because the SEC or its staff might issue unlawful subpoenas to third parties of whom respondents were unaware. If respondents were unaware of the third-party subpoenas, respondents would be unable to move to intervene in a subpoena enforcement proceeding to challenge the legitimacy of SEC conduct. (Tr. of September 28, 1981, at 63, 69-73, 77-78; Memorandum in Opposition to Dismissal, p. 8; Tr. of December 2, 1981, at 76-79.)

#### C. District Court Order of January 20, 1982.

On January 20, 1982, the District Court ordered dismissal of respondents' equitable claims. (Pet. App. 17a-24a.) The District Court stated that its "sole concern at present is whether subpoenas still outstanding, and the SEC's general investigation of the parties, is subject to pre-emptive attack as a matter of equity". (Pet. App. 24a.) The subpoenas then outstanding were those to Harrison and to co-respondent Magnuson.<sup>6</sup>

The District Court ordered dismissal because it determined that respondents had an adequate remedy at law under *Reisman* in their ability to raise their claims in challenge to the outstanding subpoenas in a subpoena enforcement action. The District Court held:

"Long-held case law suggests that plaintiffs' ability to resist enforcement of whatever subpoenas are now outstanding or may become so in the future, and to put the government to its proof, is sufficient protection against process issued in bad faith." (Pet. App. 24a.)

---

6. When this lawsuit was filed, there were six outstanding subpoenas to O'Brien and its employees which had been issued in August, 1981. (Tr. I, Ex. H.) During oral argument, the SEC informed the district court that it would not seek enforcement of these subpoenas. (Pet. App. 21a.)



The District Court declined, therefore, to grant limited discovery.

In deciding not to grant injunctive relief, the court examined the formal order and the face of the outstanding subpoenas; the court was satisfied they constituted a *prima facie* showing of legitimacy under *United States v. Powell*, 379 U.S. 48 (1964). (Pet. App. 19a, 21a.) However, the court specifically exempted O'Brien from such finding. (Pet. App. 19a-21a.) The District Court noted that a *prima facie* showing merely shifts the burden of proof to respondents. (Pet. App. 19a.) The court did not examine the merits of respondents' claims.<sup>7/8</sup> The District Court left determination on the merits to a subpoena enforcement action.

---

7. The District Court stated that "the agency's failure to 'target' plaintiff O'Brien with a 'likelihood' finding casts some doubt upon the validity of subpoenas issued to him in that a critical administrative step was left unsatisfied." The Court cited *SEC v. Wheeling Pittsburgh Steel Corp.*, 648 F.2d 118, 127 (3d Cir. 1981), and *United States v. Powell*, 379 U.S. 48 (1964). The Court, however, noted that O'Brien had complied with subpoenas to him, and stated that "counsel has admitted that there would have been compliance even if O'Brien had known he had been 'targeted'".

Counsel did not admit this. The transcript, which was not prepared until after the District Court had written its opinion, indicates that counsel stated that O'Brien would have complied with the first subpoena of February 24, 1981. (Tr. of September 28, 1981, p. 46.) O'Brien admits it had no grounds at that time to contest this first subpoena (RI, Ex. B). However, if O'Brien had known it was a target of investigation, it would have contested all later subpoenas on the ground that they exceeded the scope of the formal order S-1555, as well as other grounds. Subpoenas issued in May, June, and July, 1981 demanded records of securities transactions by approximately 30 persons and companies not named in the formal order, and demanded records of transactions by all customers in the stock of 12 companies not identified in the order. (RI, Exs. D-G.) O'Brien complied with these subpoenas only because it believed it was not a target, and thus had motive to cooperate rather than litigate with the SEC. As soon as O'Brien was informed of its status as a target, O'Brien refused compliance with additional subpoenas (RI, Ex. H) on the grounds asserted in the complaint herein.

8. The District Court specifically declined to "consider the merits" of respondents' allegation that the SEC had leaked nonpublic investigatory information to the press. (Pet. App. 22a.)



D. District Court Order of March 25, 1982.

After the order of January 20, 1981, as the Court itself later noted, the SEC "waged an aggressive investigation, issuing numerous subpoenas" to third parties. (Pet. App. 10a.) However, the SEC did not initiate subpoena enforcement proceedings on the outstanding subpoenas to Harrison or co-respondent Magnuson.<sup>9</sup>

Respondents repeticioned the District Court for relief. Respondents asserted that, although the SEC was well aware of their challenges to the legitimacy and enforceability of SEC subpoenas, the SEC was proceeding to issue subpoenas to numerous third parties. Respondents asserted the likelihood that they would not become aware of many of the third-party subpoenas. Respondents reasserted their earlier position that they would have no opportunity under *Reisman* to assert those challenges in subpoena enforcement proceedings against third-party recipients unless respondents were made aware of the issuance of each subpoena. Respondents reasserted that they would have no adequate remedy at law unless the District Court ordered the SEC to provide notice of the issuance of a third-party subpoena. Two hearings on oral argument were held on this issue. (Trs. of March 9 and 18, 1981.)

On March 25, 1981, the District Court issued a second order. (Pet. App. 9a-16a.) The Court reiterated that its prior order was based upon the existence of an adequate remedy at law in the form of an enforcement hearing. (Pet. App. 10a.) The District Court agreed that without notice, respondents would be denied opportunity to intervene in an enforcement action to prevent disclosure of information to the SEC.

---

9. A subpoena enforcement action was not initiated until April, 1982. The action was commenced in the District Court for the Western District of Washington at Seattle, even though all respondents reside and all documents are located in Spokane, Washington, or in Northern Idaho near Spokane, and even though this action was before the Eastern District in Spokane. The Western District ordered a change of venue to the Eastern District. *SEC v. Magnuson, et al.*, West. Dist. No. C-82-362, East. Dist. No. C-82-282. The matter is currently pending.

However, the court held, as the SEC argued, that respondents nevertheless had an adequate remedy in that they could seek suppression of evidence obtained unlawfully by the SEC in any subsequent civil proceeding. The court alternatively held that respondents lacked standing because the information sought did not "belong" to them.

#### E. Order of Ninth Circuit Court of Appeals.

The District Court, however, indicated it could not "say with certainty that this heretofore unresolved issue would not be determined otherwise on appeal". (Pet. App. 15a.) On appeal, the Ninth Circuit Court of Appeals ordered that the SEC provide respondents with notice of third-party subpoenas. (Pet. App. 1a-8a.)

### SUMMARY OF ARGUMENT

Congress has granted the SEC limited authority to issue subpoenas for purposes of investigations. An SEC subpoena is coercive process and must be issued as authorized by law. An SEC subpoena issued in excess or abuse of authority is unenforceable.

Congress has placed enforcement of SEC subpoenas with the courts. If a subpoena is not obeyed, the SEC must petition the courts for enforcement. A subpoena enforcement action is an adversary proceeding in which the SEC must show proper exercise of authority and in which opponents may challenge the subpoena on any appropriate ground, including lack or abuse of authority.

A subpoena recipient's protection for SEC issuance of an unlawful subpoena is the recipient's opportunity to make appearance in a subpoena enforcement action to challenge the subpoena. In *Reisman v. Caplin*, *supra*, this Court extended this protection to the target of the investigation. This Court held that "both parties [subpoenaed] and those affected by disclosure" may challenge the subpoena. 375 U.S. at 445.

In *Reisman*, this Court held that the target's remedy for SEC issuance of an unlawful subpoena to a third party is the target's opportunity to move to intervene in the subpoena

enforcement action. Although intervention is permissive, the motion to intervene provides the target a means for court scrutiny of SEC exercise of authority. This Court held such motion to intervene to constitute the target's adequate remedy at law.

In *Reisman*, this Court recognized that a target would have no opportunity to intervene in a third-party enforcement action if the third party were to obey the subpoena without challenge. In *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 363-364 (1942), this Court noted the coercive effect of an agency subpoena, with the likely consequence that a nontarget third party would comply. Therefore, in order to effectuate the target's intervention remedy, this Court provided that the target "might restrain compliance" by the third party "until compliance is ordered by a court". *Reisman, supra*, 375 U.S. 449-450.

The *Reisman* decision clearly assumes that the target of an investigation is aware of the SEC's issuance of a third-party subpoena. If the target is not aware of the third-party subpoena, the target obviously has no opportunity to move to intervene in an enforcement action. If the third-party recipient does not challenge or challenges ineffectively, for lack of motive or lack of evidence known to the target, then an unenforceable SEC subpoena issued in excess or abuse of authority nevertheless coerces disclosure affecting the target.

Therefore, respondents ask this Court to effectuate the target's intervention remedy created in *Reisman*, by providing the respondent target with notice of SEC subpoenas issued to third parties. Without such notice, the *Reisman* intervention remedy is ineffective and in substance illusory.

Notice to respondents of third-party subpoenas creates no new right or remedy. It merely effectuates an existing remedy. The SEC argues that notice will be abused and therefore should not be given. Respondents will not abuse such notice, and no contention is made that they will. The great majority of SEC investigations are civil in nature. The

secrecy required in criminal investigations by a Grand Jury is not applicable to civil investigations by the SEC, which lack the Grand Jury's checks, balances, and protections against prosecutorial excess. The SEC and the courts have adequate civil powers to deal with abuse of notice through protective orders, sanctions, and contempt.

The courts have inherent equitable power to protect citizens from unauthorized government misconduct. Congress has not precluded notice to respondents of third-party subpoenas. When Congress has chosen to legislate new remedies beyond the *Reisman* remedy, Congress has recognized the necessity of such notice in order to make the remedies adequate.

Respondents in this case make specific allegations of SEC misuse of its investigatory and subpoena authority. Respondents assert some evidence in support of their allegations. Respondents are, at the minimum, entitled to an opportunity for court scrutiny of the merits of their claims. Respondents should be granted notice on the same basis which would allow them discovery or intervention in a subpoena enforcement action. If the SEC cannot show a *prima facie* compliance with the standards of *United States v. Powell, supra*, or if respondents show sufficient evidence to infer possible SEC wrongdoing, then respondents should have notice of third-party subpoenas.

Without such notice, respondents' remedy under *Reisman* is ineffective and illusory. Respondents will be subjected to "officious intermeddling" in their affairs and interests, and harm to their reputations and businesses. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 213 (1946). Respondents will be without protection against SEC misconduct in excess and abuse of authority. Notice is necessary if respondents are to have the adequate remedy declared in *Reisman*.

10  
ARGUMENT

I

PURSUANT TO *REISMAN V. CAPLIN*, A TARGET'S REMEDY FOR SEC ABUSE OF AUTHORITY IN ISSUANCE OF A THIRD-PARTY SUBPOENA IS THE TARGET'S OPPORTUNITY TO MOVE TO INTERVENE IN THE SUBPOENA ENFORCEMENT ACTION

A. An SEC Subpoena Must Be Issued As Authorized By Law.

Congress has granted the SEC limited authority to issue investigatory subpoenas. *United States v. Powell*, *supra*, 379 U.S. 48 (1964), *United States v. Sells Engineering*, \_\_\_\_\_ U.S. \_\_\_\_\_, 77 L. Ed. 2d 743 (1983). Such subpoena must be issued "[f]or the purpose" of aiding an investigation "to determine whether any person has violated, is violating, or is about to violate" securities statutes or regulations. Sections 21(a) and (b) of the Exchange Act, 15 U.S.C. §§ 78u(a) and (b). Such subpoena must demand documents and testimony deemed "relevant or material to" the investigative inquiry. Section 21(b) of the Exchange Act, 15 U.S.C. § 78u(b). Such subpoena must be "issued by a member of the Commission or an official designated by it". Section 21(b) of the Exchange Act. Furthermore, SEC subpoenas are not self-enforcing. In case of a refusal to obey a subpoena, the SEC must bring a subpoena enforcement action against the recipient in federal court. Section 21(c) of the Exchange Act.<sup>10</sup>

This statutory structure governing SEC investigations is analogous to that governing the IRS. *See United States v. Powell*, *supra*, 379 U.S. at 57. In *Powell*, this Court held that courts would not enforce an IRS summons unless the IRS could show use of the summons in accordance with statutory authority. Specifically, this Court held:

---

10. *See also* Sections 20(a), 19(b), and 22(b) of the Securities Act, 15 U.S.C. 77u(a), 77s(b), and 77v(b).

"Reading the statutes as we do, the Commissioner . . . must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the Commissioner's possession, and [4] that the administrative steps required by the Code have been followed . . ."

379 U.S. 57-58.

In *Powell*, this Court reiterated its holding of eleven months earlier in *Reisman v. Caplin*, *supra*, that a subpoena enforcement action is an adversary proceeding in which opponents "may challenge the subpoena on any appropriate ground". *Powell*, *supra*, 379 U.S. at 58; *Reisman*, *supra*, 375 U.S. at 446, 449. Appropriate grounds include a challenge to the agency's compliance with the foregoing *Powell* standards; for example, the opponent might show "the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other reason reflecting on the good faith of the particular investigation." (Emphasis added.) *Powell*, *supra*, 379 U.S. at 58.

More recently, in *United States v. LaSalle*, 437 U.S. 298 (1978), this Court reaffirmed "the *Powell* standards, of [governmental] good faith". *LaSalle*, 437 U.S. at 318. This Court held that the purpose of the summons enforcement action "is to determine whether the agency is honestly pursuing the goals of [statute] by issuing the summons". [Emphasis added.] 437 U.S. at 316. This Court noted that the *Powell* elements were not intended as an exclusive statement, but were examples of agency action not in good-faith pursuit of congressionally authorized purposes. 437 U.S. 317 n.19.

In *LaSalle*, this Court indicated that the *Powell* standards are based upon the need to prevent both "agency abuse of congressional authority and judicial process". 437 U.S. 318 n.20. The Administrative Procedure Act specifically provides that "[p]rocess . . . or other investigative act or demand may not be issued, made, or enforced except as authorized by



law". (Emphasis added.) 5 U.S.C. 555(c).<sup>11</sup>

**B. An SEC Third-Party Subpoena Is Subject To Challenge By The Target Of Investigation.**

In *Reisman v. Caplin*, this Court held that "both parties summoned and those affected by a disclosure may . . . challenge the summons" issued by the IRS. 375 U.S. at 445. In *Reisman*, the attorneys for taxpayers under investigation brought suit against the IRS to challenge a summons issued to accountants engaged for the taxpayers. This Court clearly regarded the target-taxpayers as affected parties. 375 U.S. at 449-450.

In *Reisman*, this Court ruled that taxpayers and other affected parties had an adequate remedy at law in the statutory summons enforcement proceeding, and therefore dismissed their request for a declaration that the summons was void. This Court stated that the taxpayers "may intervene" in an enforcement proceeding. 375 U.S. at 449. This Court stated that, should a summons recipient indicate a willingness to comply, "either the taxpayer or any affected party might restrain compliance" pending an enforcement proceeding. 375 U.S. at 449-450.

**C. An SEC Third-Party Subpoena Is Subject To Challenge By A Target On Grounds That Its Issuance Violates *Powell* Standards.**

In *Reisman*, the Court indicated that appropriate grounds for challenge of an IRS summons by a recipient or affected party "would include . . . [the ground] that the material is sought for improper purpose of obtaining evidence for use

---

11. "Once a summons is challenged it must be scrutinized by a court to determine whether it [complies with *Powell* standards]. The cases show that the federal courts have taken seriously their obligation to apply this standard to fit particular situations, either by refusing enforcement or narrowing the scope of the summons. See, e.g., *United States v. Matras*, 487 F.2d 1271 (CA8 1973); *United States v. Theodore*, 479 F.2d 749, 755 (CA4 1973); *United States v. Pritchard*, 438 F.2d 969 CA5 1971); *United States v. Dauphin Deposit Trust*, 385 F.2d 129 (CA3 1967). Indeed, the District Judge in this case viewed the demands of the summons as too broad and carefully narrowed them." *United States v. Bisceglia*, 420 U.S. 141, 146-147 (1975).

in a criminal prosecution". 375 U.S. at 449. Such improper purpose is a violation of *Powell* standards, namely, the conducting of an investigation for an "illegitimate purpose". *Powell, supra*, 379 U.S. 57-58. In *Donaldson v. United States*, 400 U.S. 517 (1971), this Court reiterated that the foregoing ground constitutes one of the "instances where intervention is appropriate" by a target or other affected party. 400 U.S. at 530. The issuance of a summons or subpoena for an illegitimate purpose constitutes SEC abuse of authority. *LaSalle, supra*.

In *Reisman*, the IRS issued a summons to accountants engaged by the target-taxpayer's attorney. The attorney, acting for the taxpayer, challenged the summons on grounds that it was issued for an improper purpose and that it sought documents subject to attorney-client and work-product privileges. This Court did *not* rule that the taxpayer had no right, or no standing, to challenge the third-party summons on these grounds. To the contrary, this Court specifically held that "both parties summoned and those affected by disclosure may . . . challenge the summons" on these appropriate grounds. 375 U.S. at 445.

In *Reisman*, the target-taxpayers sought to challenge the third-party summons by means of an action for declaratory and injunctive relief. This Court denied the requested relief. However, this Court did *not* rule that the taxpayers had no remedy for IRS issuance of a third-party summons in excess or abuse of authority. To the contrary, this Court held that the statutory summons enforcement proceeding provided the target-taxpayers, as well as the summons recipient, with an adequate remedy at law. This Court found the statutory remedy to be adequate because of the taxpayers' ability to challenge the summons by motion to intervene in the enforcement proceeding.

In *Donaldson*, a taxpayer acting pursuant to *Reisman* obtained injunctions restraining his employer and the employer's accountant from complying with IRS summonses. When the IRS brought an enforcement proceeding, the taxpayer moved to intervene to challenge the summons on the ground that, since the IRS had assigned



a special agent from its criminal division to the investigation, the IRS was abusing its summons authority by seeking material for the improper purpose of obtaining evidence for a criminal prosecution.

In *Donaldson*, this Court first held that intervention was permissive, and not a matter of right. Intervention was to be granted "when circumstances are proper" upon the "usual process of balancing opposing equities". 400 U.S. at 530. In *Donaldson*, this Court denied intervention on the circumstances of that case, holding that the mere assignment of a special agent did not show an improper purpose.

In *Donaldson*, this Court did not rule that the taxpayer-target had no remedy for IRS issuance of a summons in excess or abuse of its authority. Although the taxpayer target was denied intervention, he nevertheless obtained a hearing on the merits on his allegation of IRS abuse of authority.

#### **D. An SEC Third-Party Subpoena Issued In Excess Or Abuse Of Authority Violates A Target's Interests.**

As indicated previously, this Court in *Reisman* held the target of investigation to be a party affected by a third-party subpoena issued in excess or abuse of authority. It is the target's affairs that are under inquiry by the SEC; and, even though a subpoena is issued to a third party, the subpoena demands information about the target's affairs and interests.

Prior to *Reisman*, this Court recognized that Congress granted limited investigatory authority to agencies both "to secure the public interest and at the same time to guard the private ones". *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 213 (1946). The statutory limits on SEC authority constitute statutory protections against "officials intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law". *Oklahoma Press, supra*, 327 U.S. at 213. It is the target's affairs and interests that are under investigation, and it is thus the target who needs the statutory protections against unlawful and abusive inquiry into its affairs and interests.

In *Oklahoma Press*, this Court made it clear that the affairs

and interests protected by statute "are not identical with those protected by actual search and seizure, nor are the threatened abuses the same". 327 U.S. at 213. The Fourth Amendment protects from unreasonable disclosure only documents in the possession of the target. The statutory limits on SEC authority more broadly protect the target from officious intermeddling by the SEC into the target's affairs and interests; and, therefore, the statutory limits protect from disclosure documents about a target's affairs and interests in the possession of the target or third parties. If the SEC subpoena for documents exceeds or abuses statutory authority, the possession of the documents is irrelevant.<sup>12</sup>

In addition, the effects on a person being subjected to an investigation are significant. There is the strong suspicion of wrongdoing. The Securities Act authorizes investigations only when "it shall appear to the Commission . . . that . . . provisions . . . have been or are about to be violated". Securities Act § 20(a), 15 U.S.C. § 77t(a). The Commission's Rules of Practice, applicable when the investigation in this case was commenced, provided that the Commission may order an investigation only if there is a "likelihood that a [violation of securities laws] has been or is about to be committed". 17 C.F.R. § 202.5(a).

---

12. "In the instant case, however, appellants' standing to challenge administrative summonses derives not from the Fourth Amendment, but rather from a federal statute, § 7602, and from the gloss placed upon that statute by the federal courts. . . . [T]he courts from *Reisman* and *Donaldson* onward, up to and including *LaSalle*, have identified a protectable interest in the taxpayer not to be the target of an exclusively criminal investigation in which government agents have acted beyond their statutory authority. If the civil limitation placed upon § 7602 summonses is not for the taxpayer's benefit, we have difficulty in discerning the party for whose protection it was designed. While the third-party recipients of summonses may well be motivated to refuse to comply on the grounds that the summonses are overbroad or unreasonably burdensome, there is little reason to expect them to raise the defense that the summonses were issued to further a solely criminal investigation of the taxpayer. This is not a matter of the third-party bank's interest, but of the taxpayer's." (Citations omitted.) *United States v. Genser*, 582 F.2d 292, 305-306 (3d Cir. 1978).

Common experience tells us that the accusation, or mere suspicion, of wrongdoing by a targeted person can disrupt and interfere with the business and personal relations of the targeted person with friends, associates, and other third parties who gain knowledge of the existence of an investigation. Although it may be hard to quantify, the harm to the target is immediate and real.<sup>13</sup> A person should not be subjected to an investigation unless that investigation is lawful. If the investigation is legitimate, then such harm must be accepted. However, a target must have the opportunity to demand that an agency justify its conduct by the showing of legitimacy required by *Powell* and *LaSalle*.

The limits on an agency's statutory authority constitute the standards for enforcement of agency subpoenas set forth in the *Powell* decision. The SEC has no right to inquire, by means of any subpoena to anyone, into a target's affairs and interests in excess or abuse of statutory authority. Correspondingly, in the words of the Ninth Circuit opinion below, respondents, "as target's of investigation, do have a right to be investigated consistently with *Powell* standards". (Pet. App. 6a.)

**E. A Target's Remedy For SEC Issuance Of An Unauthorized Third-Party Subpoena Is Opportunity To Move To Intervene In The Subpoena Enforcement Action.**

Under *Reisman* the target of an SEC investigation has a right to challenge a subpoena to a third party on any appropriate ground. Appropriate grounds for challenge constitute appropriate grounds for intervention. *Reisman*, *supra*; *Donaldson*, *supra*. Such appropriate grounds include the SEC's failure to meet the *Powell* standards of governmental good faith. *Reisman*, *supra*; *Powell*, *supra*; *Donaldson*, *supra*. The target *must* challenge the third-party subpoena by motion to intervene in a subpoena enforcement proceeding, since opportunity to intervene in such proceeding

---

13. There is great "potential for damage to a citizen's reputation when the government starts to ask someone else questions about that citizen". *Saunders v. Schweiker*, 508 F. Supp. 305, 309 (D.C.N.Y. 1981).

constitutes a target's adequate remedy at law for SEC violation of *Powell* standards.

In order to assure a target's opportunity for intervention, the courts will enjoin the third-party recipient from obeying the subpoena pending an enforcement proceeding. *Reisman, supra*. Although a target's intervention in such proceeding is permissive, the target is at least entitled to court review of its motion to intervene and the grounds therefor, and upon a balancing of the equities may be entitled to intervention. *Donaldson, supra*.

## II

### THE TARGET MUST HAVE NOTICE OF THE ISSUANCE OF A THIRD-PARTY SUBPOENA IF THE TARGET'S *REISMAN* REMEDY IS TO BE EFFECTIVE

#### A. A Target's Remedy For SEC Issuance Of An Unauthorized Third-Party Subpoena Necessitates Notice

Obviously, the foregoing *Reisman* intervention remedy presupposes that the target "is aware of the issuance of the [third-party subpoena] prior to compliance". *United States v. Genser*, 582 F.2d 292, 300-301 (3d Cir. 1978). If the target has no notice of the third-party subpoena, then the *Reisman* decision is a nullity because the target has no opportunity to "challenge the [subpoena] on any appropriate ground". *Reisman*, 375 U.S. at 449. Without notice, the target has no adequate remedy at law in opportunity to intervene in a subpoena enforcement proceeding.

In *Reisman*, this Court recognized that a target would have no opportunity to intervene in an enforcement action if the third party were to obey the subpoena without challenge. A third party does not share the same interests as a target to challenge a subpoena. A third party, who is told or believes he or she is not a target, suffers only the inconvenience of producing documents or giving testimony as requested, and no other adverse effects. The third party does not have the

conviction of principle, or other motivation, to undertake the costs inherent in litigating with the government.<sup>14</sup>

This Court has itself noted with respect to agency subpoenas:

"True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation." *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 363-64 (1942), quoted in *United States v. Minker*, 350 U.S. 179, 187 (1956).

If the SEC issues a subpoena to a target, the target has motivation to refuse compliance. If the target does so, the agency will be forced to initiate a subpoena enforcement action in the courts. And the courts will require the agency to show legitimate purpose, relevancy, and the other requisites of *Powell* prior to enforcement. The courts will allow the target to challenge the authority of the SEC. A subpoena in excess of or in abuse of authority will not be enforced.

On the other hand, if an investigating agency issues a subpoena to a third party, the third party will likely have no motive not to comply. Additionally, a third party may not know that the agency subpoena is not enforceable unless so ordered by a court. Indeed, the form of subpoena used by the SEC in this case (at least the ones respondents know about), and the letters accompanying such forms, *do not* inform the persons and entities subpoenaed that they can resist compliance and contest the subpoena in an enforcement action. (See Exhibits to R1, and also Exhibits to R102.)

In short, an agency which issues subpoenas to third parties rather than targets will likely avoid court scrutiny of the legitimacy of its investigative conduct. The agency can,

---

14. See footnote 19, *infra*.

therefore, consciously avoid such showing. A questionable investigation will go forward, and an otherwise unenforceable subpoena will coerce disclosures. The agency will thus exceed or abuse its statutory authority and the process of the courts.

The *Reisman* decision clearly assumes that the target of an investigation is aware of the SEC's issuance of third-party subpoenas. If the target is not aware of the third-party subpoena, the target obviously has no opportunity to move to intervene in an enforcement action.

In order to effectuate the target's intervention remedy, this court in *Reisman* provided that the target might restrain compliance by the third-party recipient of a subpoena until compliance is ordered by a court. Respondents ask that the intervention remedy created in *Reisman* be further effectuated by providing the target respondents with notice of SEC subpoenas issued to third parties. Without such notice, the *Reisman* intervention remedy is ineffective and in substance illusory.

#### B. A Target Has No Remedy In Suppression Of Evidence.

The SEC argued in this case before the courts below that notice to respondents of third-party subpoenas was unnecessary because targets were afforded adequate remedy in a motion to suppress at trial, be it criminal or civil. (Tr. of March 9, 1981, pp. 28, 31-32; Tr. of March 18, 1981, p. 9; Pet. App. 11.) The SEC based this argument on language in *Donaldson*, and upon several lower court decisions construing the *Donaldson* language.<sup>15</sup> The District Court agreed with the SEC. (Pet. App. 13a.)

*Donaldson* did not create a civil suppression remedy. The Court considered only "Donaldson's particular situation".

---

15. See *United States v. Genser*, *supra*, 582 F.2d 292 (3d Cir. 1978); *United States v. Friedman*, 532 F.2d 929 (3d Cir. 1976); *SEC v. Laird*, 598 F.2d 1162 (9th Cir. 1979). The SEC in other cases has argued against a suppression remedy. See *SEC v. ESM Government Securities, Inc.*, *supra*, 645 F.2d 310 (5th Cir. 1981).



400 U.S. at 530. The summons involved was for routine business records of Donaldson's employer. The summons met all *Powell* standards, and was enforceable, for *civil* purposes. Donaldson challenged the summons on the sole ground that the IRS was seeking the records for the improper purpose of use in a *criminal* prosecution. The Court stated that intervention was unnecessary *in his case* because, to the extent he had any protectable interest, he could assert it and seek suppression in any subsequent *criminal* trial.

In the case at hand, respondents challenge the SEC subpoenas on civil, not criminal, grounds. Respondents have no right to suppression or exclusion in any subsequent civil trial or administrative hearing. See *United States v. Janis*, 428 U.S. 433 (1976). No court, to respondents' knowledge, has ever granted civil suppression of documents or testimony obtained by abuse of congressional authority or judicial process. If such abuse is to be remedied, the court must "prevent the wrong before it occurs". *United States v. Calandra*, 414 U.S. 338, 346 (1974).

### C. The SEC Is Not A Grand Jury And Has No Inherent Right To Investigate Without Notice

The SEC argues that the consequences of providing notice to targets will be a "parade of horrors". If given notice, targets might flee prosecution, destroy documents, fabricate testimony and intimidate witnesses. The SEC argues that to prevent these possibilities, it must be granted the authority to operate in secret, like a grand jury.

The SEC's argument does not follow. First, the great majority of SEC investigations are for civil violations.<sup>16</sup> Although there may be reason to presume that persons

---

16. The SEC 48th Annual Report 1982 indicates that the SEC's "principal enforcement remedy is a Federal court injunction". *Report*, p. 1. The Report indicates that in 1982 it initiated 145 injunctive actions and 106 administrative proceedings. In 1982, it procured 136 injunctions involving 418 defendants, and in administrative proceedings revoked registrations, barred, suspended or censured 193 defendants. In 1982, the SEC was involved in procuring 24 criminal indictments against 47 defendants.

suspected of criminal conduct may possibly flee or obstruct an investigation, there is no reason to presume persons suspected of civil violations will do so. A civil investigation is no different in this respect from civil discovery in normal civil lawsuits under the Rules of Civil Procedure. Under those rules, a court has power to deal with abuses through protective orders, sanctions, and contempt. Abuses of notice to targets can be adequately dealt with by analogy to civil procedure; analogy to criminal Grand Jury procedure is not justified.<sup>17</sup>

Second, Grand Jury secrecy is justified on two bases: (1) the prevention of obstruction by targets, and (2) the protection of citizens against unfounded prosecutions. *Sells Engineering, supra*; *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, at 312-13 (5th Cir. 1981). In order to protect citizens against prosecutorial overreaching, the Grand Jury operates "independently" of the prosecutor as a check and balance on possible prosecutorial abuse. *Sells Engineering, supra*. In contrast, the SEC operates to both investigate and prosecute. The only check and balance on SEC abuse of authority is the statutory subpoena enforcement action and intervention therein under *Reisman*. This check and balance is illusory and ineffective without notice of third-party subpoenas to the target of investigation.

Third, Congress has specifically required that the Grand Jury exercise its inherent powers in secret. Federal Rule of Criminal Procedure 6(e). The SEC's authority to investigate is not inherent, but is a creature of statute. Congress has neither specifically required nor authorized the SEC to investigate in secret. And, indeed, the SEC claims discretion to investigate publicly, secretly without notice, or anywhere in between.

If the SEC can conduct secret civil investigations, without notice to targets of either the investigation or third-party subpoenas, then the SEC is more powerful than the Grand

---

17. Please refer to Respondents' Brief In Opposition To Petition For A Writ Of Certiorari, pp. 25-37.



Jury. The SEC would be allowed without check or balance to secretly investigate citizens for civil violations and to use the product of secret subpoenas to prosecute civil actions against those citizens. This cannot be the intent of Congress or this Court. *Sells Engineering, supra*.

SEC investigations are not analogous to the Grand Jury for all purposes. *Hannah v. Larche*, 363 U.S. 420 (1960). In *Oklahoma Press Publishing Co., supra*, this Court recognized that agency investigations are also analogous to civil discovery. 327 U.S. at 216. Civil discovery is the proper analogy for purposes of notice to targets of third-party subpoenas. Any presumption that citizens under civil investigation will obstruct justice is wholly unjustified.<sup>18</sup>

As Professor Bloomenthal has commented:

"In an effort to rationalize its position, the Commission [SEC] has expressed concern that premature disclosure 'might allow prospective witnesses . . . to fabricate stories to correspond with testimony that has already been given by others'. It is submitted that such a position disregards laws pertaining to perjury and suborning perjury; is an affront to all members of the bar and disregards now longstanding experience with discovery in the courts."

H. Bloomenthal, Vol. 3, *Securities Law Series, Securities and Federal Corporate Law*, § 1.12[4] at 1-50.14, quoting James W. Ruddy, *Freedom of Information Act*, Release No. 34 (Oct. 20, 1975), 8 S.E.C. Doc. 193 (Nov. 5, 1975).

#### D. Congress Has Not Precluded Notice to Targets.

The SEC argues that Congress has not required that such notice be given to targets of SEC investigations. On

---

18. The SEC asks, "Who is a target?" In the case at hand, there is no question that respondents are targets. A target is any identified person, individual or corporate, whose conduct the SEC suspects may violate securities laws. The SEC may investigate events, as in *United States v. Bisceglia, supra*, 420 U.S. 141, without knowing the identity of some or all the persons causally related to those events. But once it knows the identity of any suspected persons, that person is a target. If the SEC subpoenas information from a third party about another person, that person is a "party affected by disclosure" under *Reisman*.

the other hand, Congress has not required that SEC investigations be conducted in secrecy without notice. With the exception of specific situations, Congress has been silent with respect to the general issues of notice and secrecy in SEC investigations. In those situations where Congress has expressly provided that targets be given notice of third-party subpoenas, Congress has done so to effectuate a newly created right or remedy which goes beyond the *Reisman* remedy.

Under Internal Revenue Code Sec. 7609, which deals with IRS summons to banks, securities brokers, accountants, and other "record keepers" for a target-taxpayer, (1) Congress has granted the target a *right* to intervene in the summons enforcement action (Sec. 7609(b)(1)); (2) in addition, Congress has granted the target a *right* to initiate a proceeding to quash the summons (Sec. 7609(b)(2)(A)); and (3) Congress has provided that the IRS shall not examine documents summoned until the target has opportunity to exercise the foregoing rights (Sec. 7609(d)). In contrast, under *Reisman*, (1) the target's intervention remedy is permissive, not a matter of right; (2) the target has no right to *quash* since opportunity to intervene is an adequate remedy at law; and (3) the agency may examine the documents unless the target initiates action to procure or restrain the third party's noncompliance.

The target's rights under IRC Sec. 7609 go far beyond the *Reisman* remedy. Congress recognized that these newly created rights can be effectively asserted only if the target has notice of the third-party summons. Moreover, Congress acknowledged the target's permissive opportunity to intervene, and expressly provided that notwithstanding this rule of law, the taxpayer-target would have a *right* to intervene in enforcement proceedings against record keepers (Sec. 7609(a) and (b)(1)).<sup>19</sup>

---

19. See H.R. Rep. 94-658, 94th Cong. 2d Sess. 307 (1976) reprinted 4 U.S. Code Cong. and Admin News 3203 (1976):

Congress has shown no intention to render *Reisman* ineffective, and therefore has shown no intention that notice should not be required to effectuate *Reisman*. Indeed, the congressional scheme under IRC Sec. 7609 provides a legislative model for the need for notice under *Reisman*.

Similarly, under the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401, *et seq.*, which deals with a summons or subpoena to the bank or "financial institution" of any target, (1) Congress has granted the target a *right* to commence a proceeding to quash the subpoena in lieu of all other remedies (12 U.S.C. § 3405); (2) Congress has provided that the third party cannot comply with the subpoena, and the SEC cannot obtain documents, until the target has opportunity to quash (12 U.S.C. §§ 3402 and 3403; and (3) Congress has limited the SEC's use of subpoenaed information (12 U.S.C. § 3413).<sup>20</sup>

---

Footnote (cont.)

"The use of the administrative summons, including the third-party summons, is a necessary tool for the IRS in conducting many legitimate investigations concerning the proper determination of tax. . . . On the other hand, the use of this important investigative tool should not unreasonably infringe on the civil rights of taxpayers, including the right to privacy. . . .

"The committee believes that many of the problems in this area would be cured if the parties to whom the records pertain were advised of the service of a third-party summons, and were afforded a reasonable and speedy means to challenge the summons where appropriate. While the third-party witness also has the right of challenge, even under present law, the interest of the third-party witness in protecting the privacy of the records in question is frequently far less intense than that of the person to whom the records pertain."

The report goes on to state that the purpose of notice is to give the affected party "opportunity . . . to raise defenses which are already available" under the existing law. H.R. Rep. 309, 4 U.S. Code Cong. and Admin. News 3205. *See also* Sen. Rep. 94-938, 94th Cong., 2d Sess. 368-371.

20. *See* H.R. Rep. No. 95-1383, Sen. Rep. No. 95-1273, 95th Cong. 2d Sess. 219 (1978) *reprinted* 7 U.S. Code Cong. and Admin. News 9349: "The Government may obtain financial records using an administrative sub-

These protective rights are in lieu of, and go far beyond, the *Reisman* intervention remedy.

Again, Congress recognized that the effectiveness of the congressionally created RFA remedy necessitates notice to the target of the third-party subpoena (12 U.S.C. § 3405). The judicially created *Reisman* intervention remedy likewise necessitates such notice. Unless notice is provided, a target's opportunity to intervene is dependent on the unreviewable discretion of the SEC, on the whim of a third party, and on happenstance that the target becomes aware of the subpoena in time to do something.

In *Reisman* and *Donaldson*, this Court was certainly aware that Congress by statute had made no express provision for intervention by affected parties in a subpoena enforcement proceeding, or for restraining of subpoena recipients from compliance to allow an intervention motion. This Court created the intervention remedy by using the existing statutory mechanism. This Court recognized a right in the target, or other affected party, to challenge agency exercise of its summons authority, and as a remedy the Court found a mechanism for the expression of that right. In order to fully effectuate the recognized right, these parties must have notice of the issuance of third-party subpoenas.

#### E. The Courts Have Power To Effectuate The *Reisman* Remedy

It is the responsibility of the courts to insure that administrative action is consistent with governing statute, and thus does not exceed or abuse authority. *Oklahoma* poena or summons. Authority to issue such process must be granted by some other provision of law. Such process may be used only if there is reason to believe that it will produce information relevant to a legitimate law enforcement purpose. This standard is comparable to that in existing law for testing subpoenas. . . . 'Law enforcement' is broadly defined in section 1101, but the requirement that the purpose be 'legitimate' is an important safeguard. It is intended to prevent an agency from acting outside the scope of its statutory authority, (e.g., investigating a violation over which it has no jurisdiction), as well as from pursuing an investigation in bad faith to harass or intimidate its subject."

Press, *supra*, 327 U.S. 186, 214-218; *FCC v. Schreiber*, 381 U.S. 279, 291; *SEC v. Csapo*, 533 F.2d 7, 11 (D.C. Cir. 1976). The *Reisman* intervention remedy is an example of the exercise of that responsibility. Effectuation of that remedy through notice to a target of a third-party subpoena is further exercise of that responsibility.

The SEC's issuance of a subpoena involves the process of the courts. A subpoena is issued because compulsion is necessary to coerce information a person will not voluntarily give. The coercive force of an SEC subpoena results only from the court's ability to enforce it. When the SEC issues a subpoena, it therefore invokes the process of the court. In issuing a subpoena, the SEC announces, in effect, that it can meet the *Powell* and *LaSalle* requirements. An SEC subpoena which is issued in violation of the *Powell* and *LaSalle* requirements is thus an abuse of the the court's process. The "Court may not permit its process to be abused". *Powell, supra*, 379 U.S. 58.

The court has inherent power in equity both to effectuate its *Reisman* remedy and to protect its process. *Hecht v. Bowles*, 321 U.S. 321 (1944); *Gumbel v. Pitkin*, 124 U.S. 131 (1888). The court's equitable jurisdiction is comprehensive and is subject to limitation only if restricted by express provision, or inescapable inference, of statute. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

#### F. Notice To A Target Occasions No More Delay Than Is That Inherent In Existing Procedures.

Notice is necessary to effectuate a target's remedy under *Reisman* to intervene in a subpoena enforcement action. Without question, a subpoena enforcement proceeding may occasion some delay of an SEC investigation. However, such delay has been imposed by Congress itself, in order to subject SEC exercise of its limited authority to judicial supervision and to allow appropriate challenges to the subpoena. *Oklahoma Press, supra*, 327 U.S. 216-217;

*Reisman, supra; Powell, supra; LaSalle, supra.* The courts have well-tested civil procedures to assure any delay is kept a minimum.<sup>21</sup>

The foregoing process is neither upset nor lengthened by a motion to intervene under *Reisman* on behalf of a target or other affected party. Obviously, a target who is aware of the subpoena has opportunity to contact the recipient. The target can then request noncompliance or, if necessary, under *Reisman* can restrain compliance. As a result, some third-party recipients, who absent target contact would have obeyed the subpoena, will now fail to comply. Such delay is contemplated by and inherent in the *Reisman* decision. Any delay associated with notice to targets of third-party subpoenas is likewise inherent in the *Reisman* decision.

Moreover, both the SEC itself and the courts have the discretion to establish time limitations which are reasonable under the particular circumstances. The SEC can set the return date on its subpoena, and thus limit the response time on notice to the target. If the subpoena is not complied with on the return date, the SEC can request, and the court can order, the recipient to show cause within a few days or less. The SEC can be prepared to promptly answer the motion to intervene of a target or other affected party. The court can appropriately shorten time for consideration of such motion.

Notice to a target of third-party subpoenas does not hamper the SEC's investigation with trial-like procedures. Notice does no more than effectuate a target's opportunity to participate in an adversary subpoena enforcement

---

21. The SEC investigation of respondents is not one requiring great speed. The formal order of investigation was made in September, 1980. Prior to this, according to deposition testimony of an SEC attorney relating to respondents' nonexcludable claims in this suit, an informal investigation had been conducted since mid-1978. (See Dep. of George Prines, April 29, 1982.) The first subpoena to O'Brien was on February 24, 1981, approximately six months after the formal order. Additional subpoenas were issued to O'Brien and Harrison over the next six months.



action. Notice does not affect the SEC's discretion to determine whom and what to investigate. Notice does not imply that a target has a right during the investigation to confront accusing witnesses or to cross-examine any witnesses.<sup>22</sup>

In summary, as the Ninth Circuit noted in its decision below, a subpoena enforcement proceeding is normally disposed of on affidavit alone. (Pet. App. 7a.) Few cases proceed to a limited evidentiary hearing, and only rare cases necessitate limited discovery. Notice to a target of SEC issuance of a third-party subpoena occasions no more delay to an investigation than that inherent in the statutory subpoena enforcement proceeding itself.

**G. In Any Event, A Target Should Be Granted Notice Of Third-Party Subpoenas When The SEC Fails To Show *Powell* Standards Or When The Target Shows Proper Circumstances**

Respondents make specific allegations that the SEC and its staff have engaged in investigative conduct, and issued subpoenas, in excess and abuse of statutory authority. Respondents have produced, and can further produce, some evidence which infers a reasonable possibility of SEC misconduct in support of their allegations. Respondents

---

22. Petitioner places heavy reliance on *Hannah v. Larche*, *supra*, 363 U.S. 420. The reliance is misplaced. The respondents in *Hannah* were being investigated by a "purely investigative" agency without any authority to prosecute whatsoever. 363 U.S. 442. The respondents in *Hannah* asserted rights to be informed of specific charges, to confront accusing witnesses, and to cross-examine witnesses. Respondents in this case assert no such rights.

Unlike the agency in *Hannah*, the SEC both investigates and prosecutes. It is normal SEC practice that the same SEC attorney both investigates a person and civilly prosecutes the same person. Investigative subpoenas are used long after a decision to prosecute as a means of *ex parte* discovery for purposes of prosecution. *Hannah* constitutes no authority for denial of notice to respondents of third-party subpoenas. To the contrary, as the Ninth Circuit noted, this Court in *Hannah* acknowledged "no reason is apparent why, simply as a matter of good will, the Commission [SEC] should not in ordinary cases send a copy of its order for investigation to the person under investigation". 363 U.S. 447 n.28; Pet. App. 8a.

under these circumstances assert that they should receive notice of third-party subpoenas, and that they should have an opportunity for a hearing on the merits prior to a denial of such notice. Respondents have had no hearing on the merits of their claims.

A target's opportunity to intervene in a third-party subpoena enforcement action is permissive. A target is allowed to intervene "when circumstances are proper" upon the "usual process of balancing the opposing equities". *Donaldson, supra*, 400 U.S. at 530. Likewise, a target should be granted notice of third-party subpoenas under proper circumstances upon a balancing of the equities.

The Courts of Appeal have worked out flexible procedures to implement *Powell, Reisman, and LaSalle*.<sup>23</sup> In a subpoena enforcement action, the SEC must make an initial *prima facie* showing that the subpoena meets *Powell* standards. The showing is normally made in the affidavit in support of the SEC's application for an order to show cause why the subpoena should not be enforced. If the SEC fails to make such showing, the District Court will not enforce the subpoena. On the other hand, once such showing has been made, the burden shifts to the opponent to prove that the subpoena has been issued in excess or abuse of authority, or that it should not be enforced on some other ground.

---

23. See *U.S. v. Fensterwald*, 553 F.2d 231 (D.C. Cir. 1977); *U.S. Salter*, 432 F.2d 697 (1st Cir. 1970); *SEC v. Howatt*, 525 F.2d 226 (1st Cir. 1975); *SEC v. Knopfler*, 658 F.2d 25 (2d Cir. 1981), cert. den., 455 U.S. 908 (1982); *United States v. McCarty*, 514 F.2d 368 (3d Cir. 1975); *United States v. Genser*, 582 F.2d 292 (3d Cir. 1978); *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118 (3d Cir. 1981); *United States v. Wright Motor Co.*, 536 F.2d 1090 (5th Cir. 1976); *United States v. National State Bank*, 454 F.2d 1249 (7th Cir. 1972); *United States v. Turner*, 480 F.2d 272 (7th Cir. 1973); *United States v. Kis*, 658 F.2d 526 (7th Cir. 1981), cert. den., 455 U.S. 1018 (1982); *United States v. Church of Scientology*, 520 F.2d 818 (9th Cir. 1975); *Lynn v. Biderman*, 536 F.2d 820 (9th Cir. 1976); *United States v. Samuels, Kramer & Co.*, 712 F.2d 1342 (9th Cir. 1983).



The opponent's burden is not easily met. The opponent must do more than allege an appropriate ground. The opponent must produce some evidence, through affidavit, to support its allegations. In the absence of some evidence, the subpoena will be enforced. If some evidence is shown from which the court may infer a possibility of wrongful conduct, then the court will allow a limited evidentiary hearing normally involving no more than cross-examination of the agent issuing the subpoena. The purpose of such examination is to determine whether the court will allow further limited discovery. Discovery will be allowed only where the court determines that SEC conduct is likely to be substantiated. If no discovery is warranted, the subpoena is enforced. *See United States v. Samuels, Kramer & Co., supra*, 712 F.2d 1342 (and other cases cited in footnote 23).

On a target's motion to intervene in a third-party subpoena enforcement action, a similar procedure should be followed in balancing the equities. The SEC's showing of *Powell* standards in its affidavit is before the Court. If the showing is satisfactory to the Court, the target will not be permitted to intervene (1) unless the target alleges an appropriate ground, and (2) unless the target produces some evidence sufficient to infer the possibility of SEC wrongdoing. For example, the target in *Donaldson* was not allowed to intervene for failure to meet these conditions. If the target meets these conditions, it will be allowed to intervene in the subpoena enforcement action for purposes of a limited evidentiary hearing or discovery.

On a target's application for notice of third-party subpoenas, a similar procedure should be followed in balancing the equities. The target's application must specifically allege appropriate grounds for challenge to third-party subpoenas. The SEC may answer with an affidavit showing *prima facie* that its conduct meets *Powell* standards. If such showing is not made, or if the target produces by affidavit some evidence sufficient to infer a possibility of SEC misconduct affecting the enforceability of third-party subpoenas, then the court would order notice of third-party subpoenas.

On a target's application for notice, even if the target meets the foregoing conditions, the Court in balancing the equities may nevertheless refuse to order notice if it finds a likelihood that the target would use notice of third-party subpoenas to destroy documents, intimidate witnesses, or otherwise obstruct the investigation.

At the minimum, if *Reisman* is to have practical effect, respondents are entitled to the foregoing minimal protections. No claim has ever been made in this case that respondents, if given notice of third-party subpoenas, will abuse that notice. Respondents have legitimate claims and some evidence of SEC misconduct. Respondents have a remedy under *Reisman*, but only if they have notice of third-party subpoenas.

#### CONCLUSION

The judgment of the Court of Appeals should be upheld. Respondents should have notice of SEC subpoenas to third parties.

Respectfully submitted,

C. DEAN LITTLE  
D. WILLIAM TOONE  
LeSOURD & PATTEN

Attorneys for Respondents  
Jerry T. O'Brien, Inc.,  
Jerry T. O'Brien,  
Pennaluna & Company, Inc.,  
and Benjamin A. Harrison

DATED March 22, 1984.

No. 83-751

Office - Supreme Court, U.S.  
**FILED**  
MAR 28 1984  
ALEXANDER L. STEVENS,  
CLERK

# **In the Supreme Court of the United States**

OCTOBER TERM, 1983

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
PETITIONERS

*v.*

JERRY T. O'BRIEN, INC., ET AL.,  
RESPONDENTS

*ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

## **BRIEF OF RESPONDENTS HARRY F. MAGNUSON AND H. F. MAGNUSON & COMPANY**

WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.

By: William D. Symmes

Thomas D. Cochran

Attorneys for Respondents  
Harry F. Magnuson and  
H. F. Magnuson & Company  
11th Floor, ONB Building  
Spokane, Washington 99201  
(509) 624-5265

## **QUESTION PRESENTED**

Whether a known target of a Securities and Exchange investigation should be given notice of administrative subpoenas issued to third parties during such an investigation, particularly under the circumstances of this case.

## **PARTIES TO THE PROCEEDING**

Petitioners (who were defendants and cross-defendants in the District Court and appellees in the Court of Appeals) are the Securities and Exchange Commission and Jack H. Bookey, Lane B. Emory and George N. Prince, employees of the Commission's Seattle Regional Office. They are hereinafter referred to as "SEC".

Respondents Jerry T. O'Brien, Inc., d/b/a Pennaluna & Co., Jerry T. O'Brien; Benjamin A. Harrison, and Pennaluna & Co., Inc. were plaintiffs in the District Court and appellants in the Court of Appeals. They are hereinafter referred to as "O'Brien". Respondents Harry F. Magnuson (hereinafter "Magnuson" and H. F. Magnuson & Co. (hereinafter "HFM & Co.") were defendants and cross-plaintiffs in the District Court and appellants in the Court of Appeals.

Respondent Magnuson is a certified public accountant who resides in Wallace, Idaho. Respondent HFM & Co. is a certified public accounting firm with offices in Coeur d'Alene, Kellogg, and Wallace, Idaho.

Respondent O'Brien is a resident of Kootenai County, Idaho and is the sole owner of J. T. O'Brien, Inc., d/b/a Pennaluna & Co., a registered broker-dealer. J. T. O'Brien, Inc. is incorporated under the laws of the State of Idaho and has its principal place of business in Wallace, Idaho. Respondent Harrison is an employee of O'Brien, Inc. and resides in Spokane, Washington. Respondent Pennaluna & Co., Inc., is incorporated under the laws of the State of Idaho and has its principal place of business in Spokane, Washington.

## TABLE OF CONTENTS

	Page
I. OPINIONS BELOW .....	2
II. JURISDICTION .....	2
III. STATUTORY PROVISIONS INVOLVED .....	3
IV. STATEMENT OF CASE .....	3
A. Summary of the Case .....	3
1. Respondents' Complaints .....	3
2. District Court.....	4
3. Ninth Circuit .....	5
B. The SEC Investigation .....	6
1. Issuance of the FOI .....	6
2. Scope of Investigation Authorized by the FOI .....	6
3. SEC Use of Subpoenas Greatly Exceeds the Scope of the FOI .....	7
a. Subpoenas Directed to Magnuson ....	8
b. The SEC Has Continually Refused to Recognize the Confidentiality of the In- vestigation .....	8
c. SEC Participated in Leaking The Fact and Scope of the Investigation to News Media .....	9
d. SEC Staff Has Been Deceptive in Ob- taining Information.....	10
e. SEC Fishing Expedition Conducted Through Third Party Subpoenas.....	10
C. Litigation in District Court.....	12
1. District Court Order of January 20, 1982	13
2. The SEC Avoided the Subpoena Enforce- ment Hearing.....	13
D. The Decision of the Ninth Circuit Protected Respondents' Rights.....	15
V. SUMMARY OF ARGUMENT .....	16

## TABLE OF CONTENTS

	Page
<b>VI. THE ARGUMENT.....</b>	<b>18</b>
A. The Appellate Court Correctly Held That Notice Should be Given to Targets of the Issuance of Third-Party Subpoenas in an SEC Investigation to Ensure the Adequate Protection of a Target's Rights .....	18
1. SEC Has Limited Subpoena Power .....	18
2. Subpoenas Can Only Be Issued Within the Scope of the FOI .....	19
3. Subpoenas Can Only Be Issued in Good Faith.....	20
4. The Court Is the Guardian of the Public to Ensure that Agency Process is Properly Issued.....	21
5. A Target of an Agency Investigation Has a Protectable Interest in Third-Party Process.....	21
6. Notice of Third-Party Process Should Be Given to Targets of SEC Investigations .	24
a. Balancing of Equities Favors Notice..	24
b. As to Excessive Third Party Subpoenas, No Adequate Remedy Exists to Protect the Target's Interest Without Notice of the Issuance of Third-Party Subpoenas .....	26
B. The "Parade of Horribles" Argued by the SEC Refers to Mere Agency Convenience and Does Not Justify Reversal in This Case....	28
<b>VII. RELIEF REQUESTED .....</b>	<b>30</b>



## TABLE OF AUTHORITY

Table of Cases	Page
<i>Coca-Cola Company v. FTC</i> , 475 F.2d 299 (5th Cir. 1973) .....	21
<i>Couch v. United States</i> , 409 U.S. 322 (1973) .....	23
<i>Hecht Co. v. Bowles</i> , 321 U.S. 321 (1944) .....	17, 27
<i>Leedom v. Kyne</i> , 358 U.S. 184 (1958) .....	20
<i>Oklahoma Press Publishing Co. v. Walling</i> , 327 U.S. 186 (1946) .....	17, 19, 25
<i>Reisman v. Caplin</i> , 375 U.S. 440 (1964) .....	passim
<i>SEC v. Arthur Young &amp; Co.</i> , 584 F.2d 1018 (D.C. Cir. 1978) .....	3
<i>SEC v. ESM Government Securities, Inc.</i> , 645 F.2d 310 (5th Cir. 1981) .....	10, 20, 21
<i>SEC v. Wheeling-Pittsburgh Steel Corp.</i> , 648 F.2d 118 (3d Cir. 1981) .....	26
<i>United States v. Baggot</i> , — U.S. —, 77 L. Ed.2d 785 (1983) .....	3
<i>United States v. Bank of Commerce</i> , 405 F.2d 931 (3d Cir. 1969) .....	23
<i>United States v. Bisceglia</i> , 420 U.S. 141 (1975) .....	24
<i>United States v. Citizens State Bank</i> , 612 F.2d 1091 (8th Cir. 1980) .....	23
<i>United States v. Holmes</i> , 614 F.2d 985 (5th Cir. 1980) .....	23
<i>United States v. LaSalle Nat'l Bank</i> , 437 U.S. 298 (1978) .....	20, 24, 27, 28
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950) .....	17
<i>United States v. Powell</i> , 379 U.S. 48 (1964) .....	passim
<i>United States v. Sells Engineering, Inc.</i> , — U.S. —, 77 L. Ed. 2d 743 (1983) .....	6, 18
<i>Weinberger v. Romero-Barcelo</i> , 456 U.S. 305 (1982) .....	28

## TABLE OF AUTHORITY

Statutes	Page
12 U.S.C. §3401 .....	28, 30
15 U.S.C. §77s(b) .....	3, 6, 15, 16, 19
15 U.S.C. §77v(b) .....	3, 15, 21
15 U.S.C. §78u(a) .....	3, 6
15 U.S.C. §78u(b) .....	3, 6, 15, 16, 19
15 U.S.C. §78u(c) .....	3, 15, 21
15 U.S.C. §78u(h) .....	3
28 U.S.C. §1254(1) .....	2

### Other Authority

[1978] U.S. Code Cong. & Admin. News 9376 .....	30
[1980] U.S. Code Cong. & Admin. News 3877 .....	19, 20
[1980] U.S. Code Cong. & Admin. News 3886-3889 .....	30

**In the Supreme Court of the United States**

No. 83-751

---

OCTOBER TERM, 1983

---

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
PETITIONERS

v.

JERRY T. O'BRIEN, INC., ET AL.,  
RESPONDENTS

---

*ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

---

**BRIEF OF RESPONDENTS  
HARRY F. MAGNUSON AND  
H. F. MAGNUSON & COMPANY**

Respondents, Magnuson<sup>1</sup> and HFM & Co., hereby submit their brief in support of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

## I

### OPINIONS BELOW

The opinion of the Court of Appeals is reported at 704 F.2d 1065 (*See Pet. App. 1a-8a* where the opinion is set forth). The opinions of the District Court are not reported (*See Pet. App. 9a-16a, 17a-24a* where the opinions are set forth).

## II

### JURISDICTION

The decision of the Court of Appeals was entered on April 25, 1983. The SEC's petition for rehearing was denied on September 30, 1983 (*Pet. App. 25a.*) The SEC petitioned for a writ of certiorari on November 4, 1983, which petition was granted on January 9, 1984. The SEC invokes jurisdiction of this Court under 28 U.S.C. §1254(1).

---

<sup>1</sup> Magnuson is a graduate of the University of Idaho and the Harvard Graduate School of Business. Active in community and philanthropic affairs, Magnuson serves as Chairman of the Board of Trustees of Gonzaga University; as Vice-Chairman of the Board of Trustees of the Washington State University Foundation; as Chairman of the Board of Trustees of Idaho State University Foundation; as a member of the President's Council, Washington State University; as Chairman of the Idaho State University Business School Advisory Council; as well as chairman or member of many other educational or philanthropic organizations. Magnuson is past President of the Wallace, Idaho Chamber of Commerce; past Director of the Idaho State Chamber of Commerce; past Chairman of the Board of Regents of Gonzaga University; and past member of the Executive Board, Boy Scouts of America. He has served as a board member of the Idaho Mining Association, Northwest Mining Association, and the Western States Governor's Mining Advisory Council. He has also served on the Board of Trustees of Holy Names College Foundation and on the Board of Regents of Fort Wright College. Magnuson is a director of various businesses, including the General Telephone Company of the Northwest. He is the recipient of the Distinguished Alumnus Award from Idaho State University and will in May, 1984, receive an honorary Doctor of Laws degree from Gonzaga University.

## III

## STATUTORY PROVISIONS INVOLVED

Petitioners SEC have adequately described the statutory provisions involved in this matter.

## IV

## STATEMENT OF THE CASE

## A. Summary of the Case.

1. *Respondents' Complaints.*

The Magnuson respondents are the named targets<sup>2</sup> of an SEC Formal Order of Investigation (hereinafter "FOI"). The FOI was issued in September 1980 and authorized the investigation into specific transactions of Magnuson involving five (5) named mining companies to determine whether there were violations of the Securities Act of 1933, 15 U.S.C. §77(a) *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. §78(a) *et seq.*

An FOI launches the formal investigation, defines its scope, and establishes the outer limits beyond which the SEC investigative staff may not issue process. *See SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1023 (D.C. Cir. 1978).<sup>3</sup>

Notwithstanding that SEC subpoena power is limited to the transactions and dates framed by the FOI, the SEC served scores of subpoenas duces tecum upon Magnuson and third parties which, because they sought information and documents far beyond the scope of the FOI, were abusive. *R 102, Ex. D-X*.

After they learned of the existence of the investigation,

---

<sup>2</sup> A person whose conduct is under investigation is commonly called a "target" of the investigation. *See, e.g., United States v. Baggot*, — U.S. —, 77 L. Ed. 2d 785 (1983). With respect to any particular target, a third party is any other person or entity.

<sup>3</sup> The SEC recognizes the authority to issue subpoenas is limited to that power conferred by the Formal Order of Investigation which authorizes "use of subpoenas by designated staff members in investigating particular transactions." *Brief Pet.*, p. 12-13.

Magnuson and O'Brien filed papers in District Court seeking to limit the SEC administrative subpoenas to testimony and documents within the scope of the FOI and to enjoin SEC conduct of the investigation in bad faith. *R 1, R 26*. Magnuson did not then nor does he now seek to enjoin the entire investigation — just that part conducted outside the scope of the FOI and, thus, outside applicable statutory authority and contrary to judicial decisions construing that authority. *R 1, R 26*.

In substance, Magnuson and O'Brien sought to enjoin the enforcement of SEC administrative subpoenas not meeting the good faith requirements of *United States v. Powell*, 379 U.S. 48 (1964) as to legitimacy of purpose and relevancy to that purpose of the information and documents obtained by the subpoenas.

## 2. District Court.

The SEC moved to dismiss under FRCP Rule 12 claiming that respondents had an adequate remedy at law in the event that the SEC chose to bring a subpoena enforcement action.<sup>4</sup>

The SEC argued that respondents had the right to decline response to the SEC administrative subpoenas issued to respondents and that the SEC would then be required to bring a subpoena enforcement action in District Court to compel testimony and production of documents. The SEC further argued that respondents would have a full opportunity to challenge the SEC subpoenas in such a hearing.

The District Court initially agreed with the SEC's argument and dismissed the equitable claims of respondents, *R 61 (Pet. App. 17a-24a)* concluding that the respondents had an adequate remedy at law because they could challenge the abusive administrative subpoenas at a subsequent subpoena-enforcement hearing. *R 61*.

Following entry of the Court's order, the SEC deferred bringing a subpoena-enforcement action against respon-

---

<sup>4</sup> The case was before the District Court and the Ninth Circuit on the SEC's motion to dismiss under FRCP Rule 12. Consequently, all factual allegations of respondents were deemed true.

dents in order to circumvent respondents' opportunity to object to the overly broad subpoenas. Instead, it "waged an aggressive investigation, issuing numerous subpoenas in the Spokane area to various mining companies and brokers" (*Pet. App. 10a*). Many of the subpoenas issued to these and other third parties sought the very same information and documents which the SEC had previously sought directly from respondents and to which respondents had objected.

Thus, respondents renewed their request for equitable relief to the District Court to ensure that their remedy at law, *i.e.*, a subpoena enforcement hearing, would not be emasculated by a tactical "end run" (*Pet App. 10a*). In doing so, respondents requested they receive notice of administrative subpoenas issued by the SEC to third parties. *R 101*. Such notice would enable respondents to challenge unlawful or unauthorized subpoenas to third persons.

The District Court denied the request for notice although it noted that "the argument is not without appeal" (*Pet. App. 11a*). It did so on the grounds that the respondents lacked standing and had an alternative legal remedy besides notice of third-party subpoenas. The suggested alternative remedy was to suppress information obtained through abusive third-party subpoenas in any later proceeding against them. The District Court never reached the merits of respondents' allegations that the SEC subpoenas to third parties were issued in bad faith.

### 3. Ninth Circuit.

The Ninth Circuit agreed with the District Court's dismissal of respondents' equitable claims as they applied to subpoenas issued to the respondents themselves as "targets" of the investigation since an adequate legal remedy (*i.e.*, a subpoena enforcement hearing) existed (*Pet. App. 4a*). However, the appellate court held that, without notice of subpoenas issued to third-party witnesses in the investigation, respondents had no adequate legal remedy to test their allegations of SEC bad faith and unauthorized conduct as applied to the third-party subpoenas (*Pet. App. 4a-8a*). Thus, the appellate court, to assure that an adequate legal remedy existed with respect to third-party subpoenas, ordered that notice of such subpoenas be given. Because the District

Court had not ordered notice, the Ninth Circuit reversed that part of the District Court's order and remanded.

## **B. The SEC Investigation.**

### **1. Issuance of the FOI.**

Congress has granted the SEC "limited authority" to undertake investigations. *United States v. Sells Engineering, Inc.*, — U.S. —, 77 L. Ed.2d 743 (1983). The SEC may exercise its authority only in compliance with statutory standards and judicial decisions. *United States v. Powell*, 379 U.S. 48 (1964).

Congress has authorized the SEC to investigate alleged violations of the securities laws of the United States without the need or use of subpoenas. 15 U.S.C. §§77s(b), 78u(a). In addition, Congress has authorized the SEC to use subpoenas in aid of its investigative function. However, officers of the SEC may issue agency subpoenas only after an FOI is issued by the Securities and Exchange Commission (the "Commission") itself. 15 U.S.C. §§77s(b), 78u(b). When an FOI is issued, the Commission, consistent with the Congressionally-mandated scheme, authorizes named officers of the SEC to use subpoena power to "investigate particular transactions" which are the subject matter of the FOI.<sup>5</sup>

The SEC, through its Seattle Regional Office, began the subject investigation of Magnuson in 1978 (*Depo. Prince*, p. 61, R 172). On September 3, 1980, the Commission entered its Order of Formal Investigation, R 1, Ex. A, styled "In the Matter of H.F. Magnuson & Company." It granted limited subpoena power to certain SEC attorneys and staff in the investigation of specific Magnuson transactions.

### **2. Scope of Investigation Authorized by the FOI.**

Because the FOI issued on September 3, 1980, defines the scope in which the SEC may use compulsory process in its

---

<sup>5</sup> The SEC concedes that an FOI authorizing the use of subpoenas also limits their use to investigation of specific transactions. Brief Pet., p. 12-13.



investigation, it is important to analyze the limits of the FOI.

The FOI authorized certain SEC attorneys and staff members (the "SEC officers") to investigate a limited number of Magnuson transactions. First, the FOI authorized SEC officers to investigate whether Magnuson and certain named others had previously bought and sold stock of a single named mining company (Hecla Mining Company) on the basis of nonpublic or insider information. *R 1, Ex. A III B.*

Second, the FOI authorized SEC officers to investigate whether Magnuson previously was the beneficial owner of more than ten percent of the common stock of four named mining companies (Clayton Silver Mines, Inc., Metropolitan Mines Corporation Limited, Silver Dollar Mining Company and Sunshine Consolidated, Inc.) and, if so, whether he had made complete disclosures and filings concerning his ownership. *R 1, Ex. A III C.*

Third, the FOI authorized investigation concerning whether Magnuson previously had acquired beneficial ownership of equity securities of the same four named mining companies and, if so, whether they had failed to make disclosures and appropriate filings of the same as required under §§13(d) and 13(g) of the 1934 Act. *R 1, Ex. A III D.*

Finally, the FOI stated that a subject of investigation was whether Magnuson and other named persons had previously offered to sell and had sold stock in three named companies (Clayton Silver Mines, Inc., Metropolitan Mines Corporation Limited and Sunshine Consolidated, Inc.) in violation of the anti-fraud provisions of the Securities Act of 1933. *R 1, Ex. A III F, G, H.*

### **3. SEC Use of Subpoenas Greatly Exceeds the Scope of the FOI.**

Even though the FOI is very particular and limited, as set forth above, subpoenas have been issued by the SEC to third parties requiring testimony and production of documents in unrelated transactions in the securities of dozens of companies other than those few named in the FOI, including

transactions occurring more than a year after the issuance of the FOI. In summary, the SEC has issued subpoenas under the auspices of the September 3, 1980, FOI seeking to investigate transactions and persons not mentioned in the FOI, violations not alleged in the FOI, and events which did not even take place until years after the FOI was issued. See discussion at p. 10, *infra*. Respondents submit that such conduct constitutes bad faith proscribed by *Powell*.

#### **a. Subpoenas Directed to Magnuson.**

Without informing Magnuson or any of the other respondents herein or any other target of the investigation that an investigation was being conducted or that the FOI had been issued by the Commission, certain SEC officers proceeded to subpoena various records and documents and take testimony from various third-party witnesses. As of this date the SEC has issued at least sixty subpoenas duces tecum directed to various witnesses. See, e.g., *R 102, Ex. D-X*.

Magnuson was not aware of the existence of the investigation until July 1981, ten months after issuance of the FOI and three years after the investigation actually started, when he received various subpoenas duces tecum addressed to him calling for production of a broad category of records. Magnuson notified the SEC that he would not voluntarily comply with the subpoenas because they sought documents not authorized by the FOI. In this connection it is interesting to note that throughout the pendency of this investigation, the SEC never asked to talk with Magnuson or any other target about any matter under investigation, and has not to this day.

#### **b. The SEC Has Continually Refused to Recognize the Confidentiality of the Investigation.**

Copies of the FOI, a nonpublic and confidential document, were furnished or shown by the SEC to numerous persons, including clients of HFM & Co. and persons with whom Magnuson does business (*Depo. Prince, p. 73, R 172*), even though the investigation was to be conducted on a private,

nonpublic and confidential basis under the SEC's own rules and the terms of the FOI itself, and even though no wrongdoing is alleged in the FOI to have been committed by HFM & Co.

**c. SEC Participated in Leaking  
the Fact and Scope of the  
Investigation to News Media.**

Ignoring the private and confidential nature of the investigation, the SEC leaked to the public that an investigation of Magnuson and O'Brien was being conducted and disclosed every detail and aspect of the investigation in a manner calculated to injure, defame and cause embarrassment to Magnuson.

As a result of the leak, a news article appeared in the *Kellogg (Idaho) Evening News* on July 22, 1981, which revealed that the SEC was investigating Magnuson. *R 1, Ex. K*. The news article described the FOI in detail and went on to discuss the matters under investigation. Petitioner Bookey of the SEC was even quoted as saying in the article "We don't comment on an investigation in progress," thus confirming the investigation's existence.

Similar newspaper articles also appeared in the Spokane, Washington newspapers on July 23, 1981.<sup>6</sup>

---

<sup>6</sup> In February 1981, Sunshine Mining Company announced its intention to make a tender offer for the shares of three mining companies of which Magnuson was an officer, director and/or a substantial shareholder. The take-over attempt was met with vigorous opposition by the three companies and Magnuson in the courts and before the shareholders. During July 1981, Sunshine Mining Company formally made its tender offer to the shareholders of the three companies and the three companies made competing cash tender offers for each other's shares. During this important time when the take-over battle was being carried on before the shareholders of the three companies the SEC, through representatives of its Seattle Regional Office, actively participated in the leak of detailed information concerning the private investigation of Magnuson to the newspapers. The leak was arranged by the SEC with the cooperation of a representative of Sunshine Mining Company, known to the SEC to be a professional journalist with numerous newspaper contacts; the SEC gave him the opportunity to read and memorize the FOI and suggested that he handle the leak of the investigation to the news media. *See Depo. Bond, pp. 49-53, 45-46, R 213.*

#### **d. SEC Staff has Been Deceptive in Obtaining Information.**

In its conduct of the investigation, the SEC issued several subpoenas to O'Brien. O'Brien was not named in the FOI as a target of the investigation. His counsel had been told by the SEC that O'Brien was not a target of the investigation. O'Brien therefore voluntarily complied with several subpoenas issued by the SEC for purposes of this investigation. *R 2.*

After extensive production by O'Brien to the SEC in response to various subpoenas and after multiple reviews by SEC personnel of documents maintained at O'Brien's office,<sup>7</sup> counsel for O'Brien was belatedly informed by the SEC in August 1981, that in fact O'Brien *was* a target of the investigation.<sup>8</sup> *R 2.*

#### **e. SEC Fishing Expedition Conducted Through Third-Party Subpoenas.**

Through the use of subpoenas duces tecum directed to third parties, the SEC set out to conduct and has conducted a fishing expedition into transactions and persons unrelated in scope and time to the matters under investigation pursuant to the terms of the FOI.<sup>9</sup> The FOI was issued by the SEC on September 3, 1980, and by its terms authorized a private investigation of the ownership of and transactions effected by two individuals (including Magnuson) and six

---

<sup>7</sup> In fact, the SEC included one of Magnuson's lawyers in the list of names to be checked for trading activity in records subpoenaed from O'Brien. Tr. 38, *R 162.*

<sup>8</sup> One federal court has clearly stated that fraud, deceit or trickery are grounds for denying enforcement of SEC subpoenas since such activity amounts to abuse of process. *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310 (5th Cir. 1981). "We think it clearly improper for a government agent to gain access to records . . . by invoking the private individual's trust in his government, only to betray that trust." *Id.* at 316.

<sup>9</sup> It is interesting to note that on no occasion before the District Court or the Ninth Circuit, by brief or in oral argument, has the SEC denied that its third-party subpoenas are beyond the scope of the particular transactions being investigated under the FOI.

corporations in the stock of five mining companies, four of which are among the named targets of the investigation. According to the FOI, the matters under investigation related to purchases and sales of the stock of the five mining companies which took place at some time since before January 1, 1977, and September 3, 1980, the date of the FOI.

Armed with the FOI, representatives of the Seattle Regional Office of the SEC mounted an aggressive campaign issuing over sixty subpoenas duces tecum to brokerage firms, banks, individuals and other mining companies.<sup>10</sup> In practically every instance, these subpoenas sought to obtain records and documents relating to the ownership of and transactions effected by the targets and persons other than the targets, in securities other than those of the five mining companies named in the FOI during periods of time not covered by the FOI, with the obvious expectation of turning up violations totally unrelated to those contemplated by the FOI. As an example, on July 2, 1981, the SEC issued subpoenas duces tecum to Golconda Mining Company, Silver Buckle Mining Company, Center Star Gold Mines, Inc., Vindicator Silver-Lead Mining Company, St. Elmo Silver Mines Corporation and Rock Creek Mining Company. *See R 102, Ex. H, I, J, L, M and N.* None of these companies is the issuer of any security described or mentioned in the FOI, nor are any of these companies described or mentioned in the FOI as a target of the investigation. Even though the aforementioned companies lack any connection with the FOI, the July 2, 1981, subpoenas sought *all* of the companies' corporate records, stockholder and stock transfer records, and *all* accounting records, banking records, certificate of deposit records, security transaction records, loan records and income tax records from January 1, 1978, through July 2, 1981, and, in most instances, all correspondence with Magnuson

---

<sup>10</sup> The exact number of third-party subpoenas issued by the SEC is not known to the respondents because the SEC has refused to give notice thereof. The third-party subpoenas included in the record on appeal represent only a fraction of the total subpoenas issued at the time of the District Court proceedings. Respondents have since learned that the SEC continued to issue other third-party subpoenas following the District Court proceedings which, if in the record, would likely serve as even better evidence of the SEC's abuse of its subpoena authority.

since January 1, 1978, concerning any securities transactions or billings for services rendered by HFM & Co.

Similarly, in another example of the clear abuse of its subpoena power under the FOI, the SEC, on May 15, June 12, and June 17, 1981, issued subpoenas duces tecum to several brokerage firms under authority of the FOI. *See R 102, Ex. D through G.* These subpoenas requested essentially all of the brokerage firms' records in transactions effected by Magnuson and his entire family (and in some cases, every customer of the firm) in the securities of eighteen different companies, only three of which are even mentioned in the FOI.

The SEC has also used the FOI as a springboard to investigate a tender offer made by Sunshine Mining Company (not named in the FOI) for the shares of three other mining companies in which Magnuson held interests, which tender offer was not even initiated until six months after the date of the FOI. *See R 102, Ex. U and V.*

Clearly, these subpoenas were not authorized by the FOI nor were they motivated by any good faith desire of the SEC officers named in the FOI to carry out the private investigation authorized by the FOI. Rather, Magnuson suspects, and has asserted in the District Court proceedings, that the barrage of third-party subpoenas launched by the SEC was motivated by an overwhelming desire to "hang something on Magnuson", whether contemplated by the FOI or not, and to do so in a manner that deprives Magnuson of his rights to object to the SEC's abuse of its investigative authority.

### **C. Litigation in District Court.**

Action below was initiated on September 9, 1981, by O'Brien against the SEC and Magnuson in the United States District Court for the Eastern District of Washington. *Complaint R 1.* O'Brien sought to enjoin the SEC from violation of his statutory rights, *i.e.*, from issuing subpoenas to investigate transactions and events outside of the scope of the FOI issued by the Commission. O'Brien further sought to prevent the SEC from acting in bad faith in the conduct of the investigation.

O'Brien requested that HFM & Co be enjoined from production of certain of O'Brien's documents in its possession as accountant for O'Brien pursuant to an SEC subpoena served



upon HFM & Co for production of such documents. *R 1*.

Thereafter, on September 25, 1981, *R 26*, Magnuson filed a cross claim and third party complaint against the SEC and a third party complaint against three employees of the SEC, seeking equitable and legal relief against the SEC and its employees. Magnuson similarly sought to prevent the SEC from issuing compulsory process beyond the authority granted it by the FOI and thus without statutory authority.

### **1. District Court Order of January 20, 1982.**

Shortly after the commencement of the litigation, the SEC moved to dismiss the claims of all respondents. *R 41, 43*. Following a hearing, the District Court entered its opinion and order dated January 20, 1982, *R 61*, granting the SEC's motion to dismiss the equitable claims of the respondents, but denying its motion to dismiss their respective legal claims.

The District Court reasoned that because respondents were subject to outstanding SEC subpoenas duces tecum, respondents could refuse to comply with those subpoenas and they would then have the opportunity to object to the abuse of the SEC's subpoena authority at a subsequent subpoena-enforcement hearing. Thus, the District Court concluded that respondents would have an adequate remedy at law through the subpoena-enforcement proceeding and declined to grant equitable relief prior thereto. *R 61*.

In so concluding, the District Court stated that its "sole concern at present is whether subpoenas still outstanding, and the SEC's general investigation of the parties, is subject to preemptive attack as a matter of equity." (*Pet. App. 24a*).

### **2. The SEC Avoided the Subpoena Enforcement Hearing.**

As forecast by respondents to the District Court, *R 101*, the SEC brought no subpoena enforcement action against respondents. Instead it continued after the January 20, 1982, Order to issue an untold number of administrative subpoenas to third persons. In so doing, the SEC completely circumvented and thwarted respondents' so-called "adequate remedy at law."

Indeed, the District Court noted at a subsequent hearing on March 25, 1982, that the SEC had "waged an aggressive investigation, issuing numerous subpoenas" to third parties

since the previous hearing on January 20, 1982. *R 104*.

Following the January 20, 1982, District Court hearings, the SEC continued to issue numerous third-party subpoenas without Magnuson's knowledge and beyond the scope of the FOI. Moreover, by use of these third-party subpoenas, the SEC sought and obtained documents and information to which Magnuson had previously objected as beyond any legitimate purpose of the FOI and, therefore, beyond any proper use of the subpoena power conferred by the FOI.

Consequently, respondents Magnuson and O'Brien again urged the District Court to require the SEC to give them notice of the issuance of third-party subpoenas so that the SEC could not "end run" a subpoena enforcement hearing, and emasculate the adequacy of their remedy at law, and so that respondents could protect their rights in the absence of such a hearing. *R 68*.<sup>11</sup>

On March 25, 1982, the District Court declined to order notice. *R 104*. But in so doing, the court stated:

"The natural query at this junction is what protections exist for the ostensible 'target' of an investigation if he is *not* aware of process outstanding against third parties. Plaintiffs suggest that the only effective remedy would be to require notice to those under investigation whenever such process is issued. The argument is not without appeal." *R 104*.

The District Court also expressed concern with its ruling:

"... I cannot say with certainty that this heretofore unresolved question could not be determined otherwise on appeal. The issue is intriguing, eminently arguable, and certainly substantial in the sense that the questions raised should be authoritatively determined on appeal." *R 104*.

Although the District Court did not order notice of the issuance of third-party subpoenas, it did grant a stay of fourteen (14) days enjoining the SEC from enforcing any outstanding process to allow the question of third-party

---

<sup>11</sup> Respondents first made the Court aware of their objection to third-party process beyond the scope of the FOI at the first hearing before the Court on September 28, 1981. *Tr. 37, 77, R. 160*.



notice to be brought to the immediate attention of the Ninth Circuit. *R 104.*

Of concern to the District Court and respondents was that in the case of third-party subpoenas, the third party had no incentive either to inform the target of the outstanding subpoena or to challenge its validity in District Court. For example, if the subpoenaed third party is a broker and thus regulated by and dependent upon cooperation with the SEC for his livelihood, he cannot safely afford to question the validity of the subpoena or the scope of the information or documents sought thereby. He is simply going to turn over all requested information, often without even informing his customer that he was subpoenaed out of fear of SEC reprisals. Because there is no incentive for a third-party witness not to comply with a subpoena, it can readily be seen how an SEC investigation, relying primarily on third party subpoenas can evade judicial scrutiny even when the subpoenas admittedly exceed the scope authorized by the FOI.

A timely appeal was subsequently taken by the Magnuson respondents. *R 105.*

#### **D. The Decision of the Ninth Circuit Protected Respondents' Rights.**

The Court of Appeals reiterated the long-standing position of this Court that the targets of agency investigations were entitled to have the investigation conducted in good faith and in conformity with their legal rights. On the record before it, the Court of Appeals reasoned that notice to the targets of the investigation of third-party subpoenas was essential in order for the targets to have the opportunity to protect their rights. It concluded that the respondents should have been given notice by the SEC of subpoenas directed to third parties arising out of its investigation of the respondents.

The decision of the Court of Appeals is based on this Court's decisions in *United States v. Powell*, 379 U.S. 49 (1964), and *Reisman v. Caplin*, 375 U.S. 440 (1964), and effectuates the statutory intent of §§19(b), and 22(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), and 77v(b), in §§21(b) and (c) of the Exchange Act of 1934, U.S.C. 78u(b), 78u(c), as well as the Commission's own regulations issued thereunder.

## V

## SUMMARY OF ARGUMENT

The Magnuson respondents do not contend at this time that the SEC lacked reasonable cause to issue the subject FOI as to them or that the SEC lacks in this case the right to investigate potential securities law violations. The Magnuson respondents do not object to legitimate subpoenas issued for the purpose of investigating the particular transactions subject to the FOI. Nor do they complain of administrative depositions of third persons so long as they are conducted within the scope of the FOI.

On the other hand, because the SEC was conducting an ongoing investigation, by use of subpoenas requesting information and documents far beyond the scope of the FOI and therefore without Congressional authority, and because the SEC was obtaining such information and documents through the use of subpoenas, the Magnuson respondents sought notice of third-party process in order to have the opportunity to address the SEC's improper conduct in the appropriate forum.

Faced with the record before it, the Ninth Circuit properly ruled that notice of the issuance of third-party subpoenas by the SEC in this investigation should be given to the respondents. The ruling is consistent with Congressional legislation and the case law of this Court.

Congress legislated that SEC subpoena authority is limited to the scope and extent of the FOI issued by the Commission. Subpoenas may be used to compel testimony and production of records only for those certain transactions under investigation as defined by the FOI. 15 U.S.C. §§77s(b), 78u(b).

This Court has often held that members of the public have a right not to be investigated by federal agencies acting outside their authority. Moreover this Court has observed that targets of agency investigations may have certain remedies in the event of the abusive use of process by an agency in an investigation. Targets may seek to restrain compliance with third-party process and move to intervene in an enforcement hearing concerning third-party process in order to attack the same on any appropriate grounds. *Reisman v. Caplin*, 375 U.S. 440 (1964).

This Court has also held that members of the public are entitled to agency good faith in the use of investigative process. *United States v. Powell*, 379 U.S. 48 (1964). The issuance of third-party subpoenas, in violation of the good faith requirement of *Powell* violates a protectable interest of the party under investigation. This Court, in *Powell*, forbade judicial enforcement of an SEC subpoena issued in bad faith. This prohibition protects the rights of both the party subpoenaed and those parties affected by the subpoena to be free from agency compulsion beyond an agency's authority, purpose, or need. This Court has long recognized that interest. See, e.g., *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950).

The target of an SEC investigation is aggrieved by every violation of that interest, whether the SEC directs the bad-faith subpoenas to him or to third parties, for it is information about him and his affairs that the abusive investigation demands, exposes and uses.

The Ninth Circuit correctly held that the subpoena enforcement action is inadequate to remedy violations of the target's interest committed through abusive third-party subpoenas, unless the target knows of the subpoenas. Since *Reisman v. Caplin*, 375 U.S. 440 (1964), courts have recognized the target has a real and practical problem. No one can challenge third-party subpoenas of which he is unaware. In this case, where the targets have alleged and have made a showing of abuses that if proven would warrant denial of subpoenas at enforcement proceedings, the Ninth Circuit correctly held that notice is required to assure that those proceedings will afford an adequate remedy.

The Court of Appeals had the equitable power to order notice. *Hecht Co. v. Bowles*, 321 U.S. 321 (1944). Additionally, the court's inherent power to protect against abuse of its process supported the notice order. *United States v. Powell*, 379 U.S. 48 (1964).

The decision of the Ninth Circuit creates no new rights or remedies. It does nothing more than provide a mechanism whereby a known target of an SEC investigation will be provided an opportunity to apply to the appropriate forum in a timely manner to seek the right of intervention recognized

by this Court in *Reisman v. Caplin*, *supra*.

The Ninth Circuit's decision does not burden agency investigations. The notice requirement merely affords targets an opportunity to question the process on appropriate grounds. *Reisman v. Caplin*, *supra*. Therefore, the decision of the Circuit Court should be affirmed.

## VI

### ARGUMENT

#### **A. The Appellate Court Correctly Held That Notice Should Be Given to Targets of the Issuance of Third-Party Subpoenas in an SEC Investigation to Ensure the Adequate Protection of a Target's Rights.**

The Ninth Circuit correctly ruled that a target of an SEC investigation had a "right to be investigated consistently with the *Powell* standards." 704 F.2d, at 1068, 1069. The Court of Appeals further correctly concluded that "subpoena enforcement proceedings do not afford targets an adequate legal remedy unless the agency notifies them of the identities of the subpoenaed third parties." 704 F.2d, at 1067.

In so doing, the Court of Appeals recognized the interest of targets in receiving notice of third-party subpoenas and realized that subpoena enforcement proceedings will not adequately remedy agency violations of this interest absent notice of third-party subpoenas. Without notice, a target's rights simply cannot be protected.

##### **1. SEC Has Limited Subpoena Power.**

Congress has granted the SEC "limited authority" to undertake investigations. *United States v. Sells Engineering, Inc.*, \_\_\_ U.S. \_\_\_, 77 L. Ed.2d 743 (1983). The SEC may exercise its authority only in compliance with statutory standards and judicial decisions. *United States v. Powell*, *supra*.

In this connection, Congress has given the SEC authorization to use coercive process (subpoenas) as an aid to its investigations only after the Commission itself issues an FOI which establishes the scope of the investigation and

thus the scope of subpoena power.<sup>12</sup> 15 U.S.C. §§77s(b), 78u(b). That being so, an SEC administrative subpoena may be issued only as authorized by law. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

## **2. Subpoenas Can Only Be Issued Within the Scope of the FOI.**

One of the requirements that the agency must follow is to limit the use of subpoenas in its investigation to those matters and transactions identified in the FOI. Congress has made this requirement abundantly clear:

*"Subpoenas are enforceable only to the extent that they seek information which is reasonably relevant to matters within the scope of the Formal Order of Investigation. Should the staff uncover information indicating the advisability of pursuing possible violations not embodied within the scope of the Formal Order, it must return to the Commission and seek an amendment to the order. [H.R. Rep. No. 1321, 96th Cong., 2nd Sess. 2 (1980) reprinted*

---

<sup>12</sup> In passing legislation to enact the Right to Financial Privacy Act of 1978, amendments as applicable to the SEC, 15 U.S.C. §78u(h), Congress clearly contemplated the scope of the use of compulsory process by the SEC:

*"While the Commission's staff may make preliminary inquiries concerning possible violations of the federal securities laws, the staff has no authority to issue compulsory process without Commission approval. When it appears that the issuance of process may be necessary to develop the facts concerning a matter under inquiry, the staff brings the matter to the Commission's attention. If the Commission, by majority vote of its five congressionally-approved members, concurs with the staff's assessment, a formal order of investigation issues. This order sets forth, among other things, the names of the specific staff members authorized to issue subpoenas in conjunction with the investigation and the statutory authority pursuant to which the Commission has adopted the order. Subpoenas are enforceable only to the extent that they seek information which is reasonably relevant to matters within the scope of the formal order of investigation. Should the staff uncover information indicating the advisability of pursuing possible violations not embodied within the scope of the formal order, it must return to the Commission and seek an amendment to the order." H.R. Rep. No. 1321, 96th Cong., 2d Sess. 2 (1980), reprinted in [1980] U.S. Code Cong. & Admin. News 3877 n.2 (Emphasis added).*

in [1980] U.S. Code Cong. & Admin. News 3877 n.2 (Emphasis added).]"

The SEC concedes this requirement in its brief. (*Brief Pet. p. 12-13*).

Congress, having addressed the issue of the scope of SEC subpoena power, created and defined rights in members of the public as to the manner in which the SEC may investigate through the use of subpoenas.

This Court has often held that the federal courts have power to prevent the deprivation of a Congressionally-granted right. *See, e.g., Leedom v. Kyne*, 358 U.S. 184 (1958).

A cursory review of some of the third-party (and target) subpoenas issued in this case clearly demonstrates that subpoenas are being used in an attempt to uncover information concerning transactions well beyond the time, scope and nature of the FOI. *See, e.g., R 102 Ex. E-X*. Transgression of statutory authority by improper use of subpoenas has permeated this entire investigation. *Id.*

### **3. Subpoenas Can Only Be Issued in Good Faith.**

Agency subpoenas must seek information within statutory limits and must be issued in good faith. This Court described this good faith requirement in *United States v. Powell*, *supra*<sup>13</sup>, in determining whether or not to enforce agency process, as follows:

"Reading the statute as we do . . . [the agency] must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the Commissioner's possession, and [4] that the administrative steps required . . . have been followed . . ." 379 U.S. at 57-58.

---

<sup>13</sup> Although the decision in *United States v. Powell*, 379 U.S. 48 (1964), concerned issuance of process by the Internal Revenue Service, it is generally agreed that the principles of that case, together with other decisions of this Court, *e.g., Reisman v. Caplin*, 375 U.S. 440 (1964), and *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), apply to SEC subpoenas as well. *See SEC v. ESM Government Securities Inc.*, 645 F.2d 310 (5th Cir. 1981).



**4. *The Court is the Guardian of the Public to Ensure That Agency Process is Properly Issued.***

Agency process is not self-executing. See 15 U.S.C. §§77v(b), 78u(c). Rather, enforcement is left by Congressional statute to the federal courts. The reason is clear:

[The SEC] is not an historic guardian of individual liberties. Instead, its two functions are investigation of possible illegal activities, and adjudication of alleged violations. *Hannah v. Larche*, 363 U.S. at 446-47, 80 S. Ct. at 1516-1517. The SEC is not, like the grand jury, a protector of individuals against government prosecution." *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 312-313 (5th Cir. 1981).

This Court, in many decisions, has recognized that it is up to the courts to fashion remedies and mechanisms to ensure protection of an investigated person's rights.<sup>14</sup>

Courts are thus the guardians of the public to ensure that agency process is properly issued and investigations are properly conducted.

**5. *A Target of an Agency Investigation Has a Protectable Interest in Third-Party Process.***

A target of an agency investigation has long been held by this Court to have a protectable interest in third-party process to ensure that the same is issued in good faith and according to statutory authority. An analysis of the law which has developed regarding the interests of an investigated person in third-party process can begin with this Court's decision in *Reisman v. Caplin*, 375 U.S. 440 (1964).

In *Reisman*, attorneys for the taxpayers under investigation sought declaratory and injunctive relief against the Internal Revenue Service and an accounting firm which had been assisting the taxpayers' attorneys in tax litigation. A summons had been issued by the IRS to the accounting

---

<sup>14</sup> Courts have consistently recognized that equitable relief is required where an agency exercises its authority in excess of its statutory authority. *Coca-Cola Company v. FTC*, 475 F.2d 299 (5th Cir. 1973).

firm directing production of all papers relating to the taxpayers. The taxpayers' attorneys alleged that the summons was unenforceable since it would amount to an unlawful appropriation of the attorneys' work product for trial preparation and an unreasonable seizure requiring the taxpayers to incriminate themselves, all resulting in the denial of effective assistance of counsel.

In *Reisman*, the case reached the Court at a stage when the only affirmative action taken by the IRS was the issuance of a summons requiring the taxpayers' accountants to appear before a hearing officer. There had been no statement by the accountants that they would not voluntarily appear and produce the documents. Consequently, no summons enforcement proceeding had been initiated. In *Reisman*, the government conceded that a witness or any interested party may attack a summons before the hearing officer (or in court) asserting their constitutional or other claims. This Court stated "we agree with that view." *Id.* at 445.

This Court noted that the recipient of an IRS summons (like the recipient of an SEC subpoena) can refuse to testify or produce documents and the agency has no independent power to enforce compliance or to impose sanctions for non-compliance. Rather, the agency must proceed to Federal District Court for enforcement. The *Powell* Court noted "any enforcement action under this section would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness." *Id.* at 446. The Court further observed that either before an IRS hearing officer or at an enforcement hearing before a Federal District Court judge, the witness or any party affected by the disclosure (i.e., the target of the investigation) may challenge the summons on any appropriate ground, including the defense that the materials were being sought for an improper purpose. *Id.* at 449. In addition, this Court stated:

"Third parties might intervene to protect their interest, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene."  
*Id.* at 449.

In finding that the courts below acted properly in dismissing equitable claims to enjoin the process and leaving the



case to be decided at an enforcement hearing in Federal District Court, this Court commented upon the situation where a witness indicates that he will voluntarily turn papers over to an agency as follows:

"If this be true, either the taxpayer or any affected party might restrain compliance, as the Commissioner suggests, until compliance is ordered by a court of competent jurisdiction. This relief was not sought here. Had it been, the Commissioner would have had to proceed for a compliance, in which event the petitioners or the Bromleys (taxpayers) might have intervened and asserted their claims." *Id.* at 450.

Thus, in *Reisman*, this Court recognized the interest of a person affected by administrative subpoenas directed to a third person and further recognized that those affected persons may seek to restrain compliance and to intervene and challenge the subpoenas on any appropriate grounds.<sup>15</sup>

In the next term following the decision in *Reisman*, this Court was again asked to review the rights of affected parties in connection with administrative process in *United States v. Powell*, 379 U.S. 48 (1964).

In *Powell*, the IRS was investigating the tax liability of a taxpayer. In so doing, the IRS issued a summons directed to Powell, the president of the taxpayer, requesting production of certain of the taxpayer's records. Powell refused to comply. A proceeding for judicial enforcement of the administrative summons was then initiated by the IRS. The taxpayer joined in the proceeding. The lower court allowed limited review of the records and the taxpayer and its president appealed. The Court of Appeals reversed the judgment and certiorari was granted so that this Court could resolve

---

<sup>15</sup> This Court has never provided a complete list of the appropriate grounds referred to in *Reisman*. Such appropriate grounds, however, include the Fifth Amendment privilege against self-incrimination, see *Couch v. United States*, 409 U.S. 322 (1973); the attorney-client privilege, *Reisman v. Caplin*, 375 U.S. at 449; free exercise of religion, *United States v. Holmes*, 614 F.2d 985 (5th Cir. 1980); freedom of association, *United States v. Citizen State Bank*, 612 F.2d 1091 (8th Cir. 1980); and Fourth Amendment claims, *United States v. Bank of Commerce*, 405 F.2d 931 (3rd Cir. 1969).

a conflict among the Circuits concerning the standards the IRS must meet to obtain judicial enforcement of its summonses. Thus, the decision in *Powell* concerned both the recipient and the affected party's interests and rights concerning agency process.

In *Powell*, the Court held that in order to be entitled to enforcement of agency process the agency must show good faith by demonstrating the following:

"[The agency] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *Id.* at 57-58.

At any such hearing on enforcement, the affected party may challenge the summons on any appropriate ground. *Id.* at 58. The agency must meet the test of good faith set forth in *Powell*, and the affected person may challenge agency process on any appropriate ground including abusive process issued for any purpose reflecting adversely on the good faith of the particular investigation. *Id.* at 58.

The *Powell* Court did not provide a complete analysis of every instance of abusive process which would render agency process invalid. However, the court noted that such abuse would take place if the agency process were issued for purposes other than those reflecting the good faith of the particular investigation. *United States v. Powell*, 379 U.S. at 58. Indeed, this Court noted in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), that the indication of various statements concerning abusive process in *Powell* was not meant to be exhaustive. "Future cases may well reveal the need to prevent other forms of agency abuse of Congressional authority in judicial process." *Id.* at 318 n.20.

## **6. Notice of Third-Party Process Should Be Given to Targets of SEC Investigations.**

### **a. Balancing of Equities Favors Notice.**

Congress has placed the judiciary between agency process and enforcement of the same. *United States v. Bisceglia*, 420 U.S. 141, 151 (1975).

This Court has insisted that administrative agencies issue process in good faith because that is the minimum conduct required in the balance the Court has struck between the competing interests at stake in the enforcement of administrative subpoenas. In the interest of effective enforcement of Congressional policies, the Court has recognized Congress' power to authorize proper agency investigations. But mindful that any investigation is an intrusion into private affairs which creates a burden on the lives and resources of private parties, the Court has prohibited judicial enforcement of agency subpoenas that seek to compel information outside the agency's investigative authority.

The private interests being protected are the "interests of men to be free from officious intermeddling." *Oklahoma Press Publishing Co. v. Walling*, *supra*, 327 U.S., at 213.

The requirements of this Court protect those interests by requiring a legitimate purpose to the investigation, relevancy in the information sought, adherence to the agency's own procedures, a need behind the inquiry, *United States v. Powell*, *supra*, and, beyond these specifics, avoidance of any action that would abuse the subpoena power entrusted by Congress to the agencies.

Thus, a subpoena issued in violation of *Powell* violates the private interests of those affected by it; an abuse arises at the moment the coercive process issues; and affected parties are burdened with illegitimate agency demands. The courts therefore refuse to enforce such subpoenas.

The target's affairs are exposed by an unauthorized governmental inquiry; the target suffers inevitable publicity; loss of time and energy; and suspicion and doubt are cast among his customers, colleagues, and personnel. It is against the target that the agency may use information obtained in disregard of the checks on its own administrative procedures. The target suffers these abuses from any bad-faith subpoena issued in the investigation of him. Whether the bad-faith subpoena is directed to him or to a third party, any violation of *Powell* violates the target's interest in freedom from "officious intermeddling."

In the event a target is the recipient of a subpoena or other agency process and refuses to comply, the appropriate remedy is a court-held enforcement hearing.

In the usual case, the recipient of an administrative subpoena may not bring an independent action seeking to quash the subpoena or test the legality of the underlying investigation, and can only make such a motion in response to a subpoena-enforcement action brought by the agency issuing the subpoena. *See, e.g., Reisman v. Caplin*, 375 U.S. 440 (1964). Similarly, there are many circumstances in which those subjected to an agency investigation must await final agency action before challenging the conduct of the investigation or other agency proceedings. *See, e.g., SEC v Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118 (3d Cir. 1981). The rationale in such instances is that normally the private party has an adequate remedy at law to challenge the action in a subsequent subpoena enforcement proceeding or in an appeal from a final agency decision. This is clearly not the case in the instance of third-party process.

In *Reisman*, the taxpayers knew about the third-party process. But in cases where the target does not know about the third-party process, there is a need for the Court to identify a mechanism to give the target an opportunity to raise his contentions in the appropriate forum on any appropriate ground. Thus, the Court must make the right of a target to intervene and present his case real and not illusory.

The SEC may not act in bad faith or outside of its statutory authority. Particularly, in cases such as this where a showing of agency bad faith and extralegal activity has been made, the balance of equities clearly favors the requirement of notice.

**b. As to Excessive Third-Party  
Subpoenas, No Adequate Remedy  
Exists to Protect the Target's  
Interest Without Notice of the  
Issuance of Third-Party Subpoenas.**

This Court held in *Reisman v. Caplin*, 375 U.S. 440 (1964), that a subpoena-enforcement proceeding is an adequate remedy at law to subpoena recipients and other affected parties raising challenges to a subpoena. The lower Federal courts ever since have recognized the question that *Reisman's* holding necessarily raises: if the "other affected parties" have their remedy only at an enforcement pro-

ceeding, must not the affected parties receive notice of the subpoena for that remedy to be adequate? In the case of abusive third-party subpoenas, how can the investigated person's rights be protected if he has no notice of the third-party subpoena? The Ninth Circuit struggled with those questions in this case and decided that notice must be given to make the enforcement proceeding an adequate remedy to the target who is injured by third-party subpoenas in violation of *Powell*.

If abusive third-party subpoenas were issued unknown to Magnuson and the third party voluntarily complied with the same, Magnuson has no way to guarantee or enforce his rights; he has no means to challenge the abusive subpoenas issued to third parties without his knowledge.

In the instant case, the Court of Appeals did not involve itself in agency investigations. The Court set forth no ruling affecting who, what, why, when or how members of the public may be investigated by the SEC. The Ninth Circuit created no new rights in the Magnuson respondents. Rather, its decision merely provided a mechanism by which the rights vouchsafed by Congress and implemented by this Court in *Reisman*, *Powell* and *LaSalle* might be meaningful. In so doing, the appellate court properly exercised its equity jurisdiction.<sup>16</sup>

The appellate court had the inherent power to protect its process and, as such, was empowered to assure the adequacy of the legal remedy. *Powell* invoked the same protective power in admonishing that a "court may not permit its process to be abused." 379 U.S., at 58.

Thus, the Court of Appeals had all the power necessary to order notice. As an exercise of equity and in protection of its own process, the court fashioned a decree to assure that the

---

<sup>16</sup> The hallmark of equity jurisdiction is flexibility. The Court stated in *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944):

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interests and private needs as well as between competing private claims."

subpoena enforcement proceeding would afford an adequate remedy.<sup>17</sup>

The notice mechanism implements what this Court and Congress have already established; namely, the right of a target to seek judicial review of agency subpoenas. The Court of Appeals merely ensured that the right to attack abuses and lack of good faith would not vanish through lack of knowledge. In the absence of notice, this right becomes meaningless.

**B. The "Parade of Horribles" Argued by the SEC Refers to Mere Agency Convenience and Does Not Justify Reversal in This Case.**

By requiring notice the Court of Appeals merely insured compliance with §§19(b) and 22(b) of the Securities Act and §§21(b) and 21(c) of the Exchange Act, and followed the lead taken by this Court in *Reisman*, *Powell* and *LaSalle*. If no notice is required to be given to targets, the SEC can evade Congressionally-mandated safeguards for prevention of agency abuse: judicial review of subpoenas at an enforcement hearing.

Nevertheless, the SEC raises a "parade of horrors" listing far-fetched ways by which targets with notice could obstruct agency investigations. (*Brief Pet.* 27-35). This is merely speculation, utterly without support in the record before the Court.

The SEC's claim that notice will corrupt and delay investigation is patently exaggerated. On the contrary, prior notice will not unduly burden *lawful* SEC investigations.

---

<sup>17</sup> The SEC argues that neither the Constitution nor the securities laws support the notice order decreed by the Court of Appeals. (*Brief Pet.* 11-16). The SEC's brief also discusses the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401, *et seq.* (*Brief Pet.* 6, 9, 20-21). However, nothing in the legislative history of the Act suggests that Congress intended to restrict or confine the federal court's equitable powers. Only the clearest statement of such an intention would justify such an interpretation of the Act. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). The SEC does not suggest that Congress had any such intent in the Act. Accordingly, the Act is irrelevant to the decision of this case, except as it suggests that notice is a workable device acceptable to Congress to protect interests jeopardized by abusive administrative subpoenas.



Notice is particularly appropriate where, as in this case, a showing has been made of SEC bad faith. The SEC itself holds the greatest control over any possibility that prior notice will burden an investigation. As long as the SEC conducts its investigations consistently with the *Powell* standards, prior notice will not by itself create any new rights in a target nor any new burdens upon the SEC.

Notice will not cause undue delay. Presumably each SEC subpoena bears a return date by which the recipient is to comply if he intends to do so. Before that date, the SEC has no ground to complain of delay. Notice need not extend the return date. With or without notice given, the SEC can seek enforcement as promptly as it chooses after the return date. Notice therefore injects no more delay into an investigation than the mechanics of the subpoena itself require.

Nor will notice result in the undermining of witnesses or evidence as feared by the SEC. The court that has the power to compel enforcement is fully able to protect against abuses by the target. The court can enter such protective or limiting orders as the circumstances dictate. The court should not indulge, however, in the presumptions of lawlessness that the SEC allows itself. (*Brief Pet.* p. 27-29). There is no basis for concluding in the abstract that targets will obstruct investigations. A court faced with specific SEC allegations of misconduct may tailor such relief as is appropriate.

Notice will not engender needless litigation; notice will only empower a target to learn whether the SEC is complying with the *Powell* standards. On the other hand, targets intent on obstruction are likely to obstruct with or without notice. The SEC has obtained relief from obstruction in the past, and will again in the future. Notice does not present so great a risk of obstruction as to outweigh the need to assure protection of the target's right.

Besides, in any investigation where a target learns of the third party process by some other means, the same "parade

of horrors" is no less a possibility.<sup>18</sup>

In this case, the SEC has never disputed that it is using subpoena power to investigate matters other than those contemplated by the FOI. A clearer case for notice would be difficult to find.

It is up to the federal courts to fashion the appropriate mechanisms to ensure that a person's rights will not be abused. To effectively control abuse of process by the SEC, the target of the investigation must be able to knowingly exercise his rights.

To deny targets notice of agency process issued to third parties, especially in the circumstances which obtain in this case, is to deny *all* targets the ability to assert their rights to be investigated consistently with the good faith standards set forth in *United States v. Powell*, 379 U.S. (1964), and to render useless the Court's holdings in *Reisman* and *Powell*.

## VII

### RELIEF REQUESTED

The decision of the Court of Appeals more fully implements those rights and should be affirmed.<sup>19</sup>

---

<sup>18</sup> The SEC's "parade of horrors" is not new. The same litany was urged by the Chairman of the Securities and Exchange Commission before Congress in an unsuccessful attempt to exempt the SEC from the disclosure provisions of the Right to Financial Privacy Act of 1978, 12 U.S.C. §3401 *et seq.* See H.R. Rep. No. 1321, 96th Cong., 2d Sess. 2 (1980) reprinted in [1980] U.S. Code Cong. & Admin., News 3886-3889.

<sup>19</sup> The Privacy Protection Study Committee of Congress noted "post-notification . . ." is a useless exercise. What privacy is there to protect once a government agency has the information? Subsequent notice seems to add insult to injury." See [1978] U.S. Code Cong. & Admin. News 9376.



DATED: March 26, 1984

Respectfully submitted,  
WITHERSPOON, KELLEY, DAVENPORT &  
TOOLE, P.S.

WILLIAM D. SYMMES

THOMAS D. COCHRAN

*Attorneys for Respondents  
Harry F. Magnuson and  
H. F. Magnuson & Company  
11th Floor, ONB Building  
Spokane, Washington 99201  
(509) 624-5265*

RECEIVED

MAR 10 1984

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

SECURITIES AND EXCHANGE	)	
COMMISSION, et al.,	)	
	)	
Petitioners,	)	NO. 83-751
	)	
v.	)	MOTION FOR ARGUMENT BY
	)	MORE THAN ONE COUNSEL
JERRY T. O'BRIEN, INC. et al.,	)	
	)	
Respondents.	)	
	)	

Respondents, Jerry T. O'Brien, Inc., and Jerry T. O'Brien (hereinafter "O'Brien") and co-respondents H. F. Magnuson & Company and H. F. Magnuson (hereinafter "Magnuson") respectfully move for an order allowing more than one counsel to present oral argument in this matter.

1. Basis of Motion. This motion is based upon United States Supreme Court Rule 38.4 and Rule 42.

2. Grounds for Motion. The grounds for this motion are as follows:

A. Throughout the entire history of this litigation, respondents and co-respondents have been separately represented by different law firms. Respondents have been represented by the Seattle, Washington, law firm of LeSourd & Patten. Co-respondents Magnuson have been represented by the Spokane, Washington, law firm of Witherspoon, Kelley, Davenport & Toole, P.S. In all lower court proceedings, counsel have argued separately.

B. This action was commenced by respondent O'Brien against the Securities and Exchange Commission and against co-respondents Magnuson. O'Brien sought to enjoin investigatory conduct by the SEC and also sought to enjoin Magnuson's compliance with outstanding SEC subpoenas. Magnuson thereafter cross-claimed against the SEC. As set forth below, O'Brien's claims for relief differ significantly from Magnuson's claims for relief.

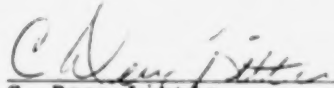
C. Although they share some issues in common, the positions of respondents O'Brien and co-respondents Magnuson differ as follows:

(1) The Commission by formal order S-1555 has determined to investigate Magnuson and authorized staff to issue subpoenas for purposes of such investigations. Numerous third-party subpoenas have been issued which exceed the scope of the formal order and which demand production of information wholly irrelevant to any legitimate investigative purpose expressed in the order.

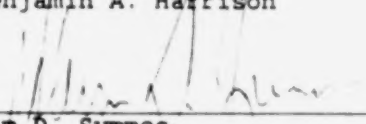
(2) The Commission has made no determination to investigate O'Brien. SEC staff has informed O'Brien he is under investigation under formal order S-1555 although (i) the order does not name O'Brien, (ii) staff previously informed O'Brien he was not a target under the order, and (iii) staff has indicated the investigation of O'Brien is for violations not specified in the order. O'Brien asserts that the SEC lacks authority under statute and SEC regulation to investigate it without Commission determination to do so. O'Brien further asserts that SEC subpoenas demanding information on it are unenforceable because the Commission has not designated and authorized staff to issue such subpoenas as authorized by law.

3. Relief Requested. Respondents O'Brien and co-respondents Magnuson each seek an order of this Court allowing more than one counsel to argue on behalf of respondents' side in this matter. This should not unduly delay or belabor oral argument on this matter. This would, in the opinion of each movant, aid the presentation of its respective position and allow the Court opportunity to inquire fully into each position as the Court may deem appropriate.

DATED: March 8, 1984.

  
C. Dean Little  
LESOURD & PATTEN  
3900 Seattle-First National  
Bank Building  
Seattle, Washington 98154  
(206) 624-1040

Attorneys for Respondents  
Jerry T. O'Brien, Inc.  
Jerry T. O'Brien  
Pennaluna & Company, Inc.  
and Benjamin A. Harrison

  
William D. Symmes  
WITHERSPOON, KELLEY,  
DAVENPORT & TOOLE, P.S.  
11th Floor, Old National Bank  
Building  
Spokane, Washington  
(509) 624-5265

Attorneys for H. F. Magnuson  
& Company and Harry F. Magnuson

CERTIFICATE OF SERVICE

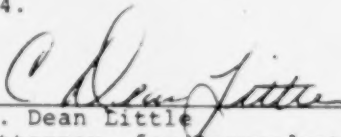
I hereby certify that all parties required to be served have been served copies of the foregoing Motion for Argument by More Than One Counsel, by airmail on March 9, 1984, addressed to:

Rex E. Lee  
Solicitor General of the United States  
Department of Justice  
Washington, DC 20530

Linda D. Fienberg  
Associate General Counsel  
Securities and Exchange Commission  
450 5th Street, NW  
Washington, DC 20549

with proper first-class postage thereon prepaid. I am a member of the Bar of the Supreme Court of the United States.

DATED March 9, 1984.

  
\_\_\_\_\_  
C. Dean Little  
Attorney for Respondent Jerry T.  
O'Brien, Inc., Jerry T. O'Brien,  
Pennaluna & Company, Inc., and  
Benjamin A. Harrison

No. 83-751

Office - Supreme Court, U.S.

FILED

APR 10 1984

ALEXANDER L. STEVAS  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1983

---

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
PETITIONERS

v.

JERRY T. O'BRIEN, INC., ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

---

REPLY BRIEF FOR THE PETITIONERS

---

REX E. LEE

*Solicitor General  
Department of Justice  
Washington, D.C. 20530  
(202) 633-2217*

DANIEL L. GOELZER

*General Counsel  
Securities and Exchange Commission  
Washington, D.C. 20549*

---

## TABLE OF AUTHORITIES

Cases:	Page
<i>Donaldson v. United States</i> , 400 U.S. 517 .....	1, 2, 3, 4
<i>FTC v. Standard Oil Co.</i> , 449 U.S. 232 .....	8
<i>Hannah v. Larche</i> , 363 U.S. 420 .....	5, 8
<i>Rakas v. Illinois</i> , 439 U.S. 128 .....	3
<i>Reisman v. Caplin</i> , 375 U.S. 440 .....	1, 2, 3, 4
<i>Sutphen Estates v. United States</i> , 342 U.S. 19 .....	5
<i>United States v. Arthur Young &amp; Co.</i> , No. 82-687 (Mar. 21, 1984) .....	8, 9
<i>United States v. Miller</i> , 425 U.S. 435 .....	3
<i>United States v. Payner</i> , 447 U.S. 727 .....	3
Constitution and rules:	
U.S. Const. Amend. IV .....	3, 4
Fed. R. Civ. P.:	
Rule 24(b) .....	5
Rule 24(b) (2) .....	5

# In the Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 83-751

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
PETITIONERS

v.

JERRY T. O'BRIEN, INC., ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

---

## REPLY BRIEF FOR THE PETITIONERS

---

A. 1. Respondents base their arguments heavily on this Court's decisions in *Reisman v. Caplin*, 375 U.S. 440 (1964), and *Donaldson v. United States*, 400 U.S. 517 (1971), which recognize that under certain circumstances a person with an interest in documents summoned or subpoenaed from a third party may seek permissive intervention in proceedings brought to obtain enforcement of the summons or subpoena. Respondents argue (see O'Brien Br. 16-17) that "[u]nder *Reisman* the target of an SEC investigation has a right to challenge a subpoena to a third party on any appropriate ground";



that “[s]uch appropriate grounds include the SEC’s failure to meet the *Powell* standards of governmental good faith”; and that “[i]f the target has no notice of the third-party subpoena, then the *Reisman* decision is a nullity” because the “target” has no opportunity to challenge the subpoena. See also *Magnuson Br.* 20-28. Respondents then contend that the court of appeals in this case merely created a procedural mechanism to protect a “target’s” opportunity to seek permissive intervention. See *Magnuson Br.* 27; *O’Brien Br.* 19.

Even if respondents’ interpretation of *Reisman*, *Powell*, and *Donaldson* were correct, it would not follow that the court of appeals’ notice requirement is justified. Respondents cite no authority and we are aware of none holding that potential permissive intervenors in civil litigation must be given notice of pending or potential litigation. In addition, for all the reasons set forth in our opening brief, we think that judicial creation of such a procedural requirement in the present context would be contrary to Congress’s intent, as expressed in the legislation governing SEC investigations and subpoenas. See *Govt. Br.* 16-23.

2. In any event, respondents have read far too much into the cases upon which they rely. Those cases do not by any means establish that it is appropriate for a “target” asserting *Powell* claims to intervene in a summons or subpoena enforcement proceeding. First, respondents, like the court of appeals (see *Pet. App.* 6a), erroneously construe *Powell* to mean that “targets” of an investigation “have a right to be investigated consistently with the *Powell* standards.” As we pointed out in our opening brief (at 24), however, *Powell* was exclusively concerned with the rights of a recipient of a summons or sub-

poena and said nothing whatsoever about the rights of a "target." *Powell* did not recognize a "target's" right to challenge a third-party subpoena or summons any more than the Fourth Amendment grants a "target" the right to challenge the reasonableness of a third-party search that might affect the "target's" interests.

Second, neither *Reisman* nor *Donaldson* held or stated that a "target" may intervene in a summons or subpoena enforcement proceeding to contest whether the *Powell* standards have been met. In *Reisman*, attorneys for taxpayers claimed that a third-party summons threatened to violate their work-product privilege and the taxpayers' rights under the Fourth Amendment.<sup>1</sup> They therefore sought injunctive and declaratory relief against compliance. Affirming the dismissal of their suit, this Court held that the taxpayers had an adequate remedy at law since they could seek to intervene in any enforcement proceeding in order "to protect their interests" (375 U.S. at 449) or to assert "their constitutional or other claims" (*id.* at 445).<sup>2</sup> However, *Reisman* did not explain in any greater detail what "interests" or "claims" would justify intervention. *Reisman* thus

---

<sup>1</sup> Under more recent cases, it seems clear that the taxpayers had no protectable Fourth Amendment interest in the records summoned from their accountants. *United States v. Payner*, 447 U.S. 727, 731-732, 735 (1980); *United States v. Miller*, 425 U.S. 435, 443 (1976). See also *Rakas v. Illinois*, 439 U.S. 128, 133-138 (1978) (rejecting theory of Fourth Amendment "target" standing).

<sup>2</sup> The Court also stated (375 U.S. at 450) that the taxpayers could seek to enjoin voluntary compliance with the subpoena, thereby compelling the initiation of an enforcement proceeding in which they could attempt to intervene.

provides no support for respondents' assumption that a third party's interest "in being investigated consistently with *Powell*," independent of any interest in the documents being subpoenaed, would suffice.

*Donaldson*, the other case upon which respondents' argument rests, likewise did not hold that a "target's" interest in being investigated consistently with *Powell* provides a proper basis for intervening in a summons or subpoena enforcement proceeding. In *Donaldson* a taxpayer who claimed that a third-party summons had been issued solely for the improper purpose of gathering evidence for use in a criminal prosecution of him was denied intervention in the summons enforcement proceeding.<sup>3</sup> This Court affirmed, holding that intervention under *Reisman* "is permissive only and is not mandatory" (400 U.S. at 529) and that "the taxpayer's interest [was] not enough and [was] not of sufficient magnitude \* \* \* to conclude that he is to be allowed to intervene" (*id.* at 531). Obviously this holding lends no support to respondents' arguments here.

3. Whether and if so under what circumstances it might be appropriate for a district court to permit intervention by a "target" asserting *Powell* claims are unsettled questions that the Court need not de-

---

<sup>3</sup> O'Brien's contention (Br. 12-13) that *Donaldson* was asserting a *Powell* claim is strained. In *Donaldson* the taxpayer sought intervention by claiming that the summons had been issued for an improper criminal investigatory purpose (*id.* at 521); he did not invoke *Powell*. If the Court understood him to be asserting a *Powell* claim, it apparently felt that such a claim carried little force, since the Court described *Donaldson's* interest in the enforcement proceeding as "nothing more than a desire \* \* \* to counter and overcome [the recipients'] willingness, under summons, to comply and produce records" (*id.* at 531).

cide in this case. In order to be eligible for permissive intervention, the "target" would have to show that his "claim or defense and the main action have a question of law or fact in common" (Fed. R. Civ. P. 24(b)(2)). Neither the court of appeals nor respondents have made any effort to show how a "target" asserting *Powell* claims could satisfy that standard, and it is not clear that it could be met.

Even if a "target" could establish eligibility for permissive intervention, a district court would appear to have strong reasons for denying his request in virtually every case in which, as here, the proposed intervenor alleges no interest in the documents. "In exercising its discretion the court [must] consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties" (Fed. R. Civ. P. 24(b)). Accordingly, the need to prevent delay of agency investigations would counsel against discretionary intervention in most subpoena enforcement proceedings. See *Hannah v. Larche*, 363 U.S. 420, 443 (1960). Moreover, it is not apparent why a "target" should be permitted to intervene to contest compliance with *Powell*, rather than making such claims if and when he is served with a subpoena. If a "target" has not been served with a subpoena, his claim would appear to be "too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene" (*Sutphen Estates v. United States*, 342 U.S. 19, 23 (1951)). On the other hand, if he has been served, there is little reason to allow intervention for the purpose of litigating claims that "can properly be adjudicated elsewhere" (*ibid.*).

In sum, the best that a "target" wishing to present *Powell* claims can assert is that if he had notice of

third-party subpoenas he *might* be eligible for permissive intervention in enforcement proceedings and *might* be able to persuade the trial court that the balance of equities in a particular case favored intervention. Such speculative possibilities are a far cry from a general "right to be investigated consistently with the *Powell* standards" (Pet. App. 6a) and provide an insufficient basis for burdening the Securities and Exchange Commission and like agencies with the obligation to provide "targets" with notice of all third-party subpoenas.

B. 1. In their briefs in this Court, respondents have abandoned the decision of the court of appeals, which held that the Commission must give "targets" notice of subpoenas issued to third parties "[a]bsent special circumstances involving a serious threat to the integrity of the investigation" (Pet. App. 8a). Instead, respondents now argue that requiring notice of third-party subpoenas was justified in this case due to respondents' particular allegations of agency abuse. Magnuson Br. 15-17, 27; O'Brien Br. 9, 26, 28-29. See also Wedbush Am. Br. 25-28. Magnuson asserts (Br. 17):

In this case, where the targets have alleged and have made a showing of abuses that if proven would warrant denial of subpoenas at enforcement proceedings, the Ninth Circuit correctly held that notice is required to assure that those proceedings will afford an adequate remedy.

O'Brien goes further and constructs (Br. 30-31) an elaborate procedure for determining whether notice should be ordered.<sup>4</sup>

---

<sup>4</sup> O'Brien states (Br. 30-31):

The target's application [for notice] must specifically allege appropriate grounds for challenge to third-party

Respondents' refusal to defend the court of appeals' broad holding is understandable, but their narrower arguments simply will not support the judgment below. There is not one word in the court of appeals' opinion to suggest that the court's decision was based on respondents' factual allegations. On the contrary, the court stated flatly (Pet. App. 1a) that the case "present[ed] only questions of law." In addition, since respondents and their amicus Wedbush have devoted so much space to allegations of SEC abuse, it bears emphasis that the Commission vigorously contests their charges and that none of those allegations has been accepted by any court, including the court of appeals. Obviously, then, those charges cannot be used to prop up the court of appeals' decision.

2. Even if the court of appeals had adopted the position that respondents now advance, its decision would still be indefensible. Such a holding would be equally devoid of constitutional and statutory support and equally inconsistent with the laws governing SEC investigations. And the practical consequences of respondents' arguments would be just as unac-

---

subpoenas. The SEC may answer with an affidavit showing *prima facie* that its conduct meets *Powell* standards. If such showing is not made, or if the target produces by affidavit some evidence sufficient to infer a possibility of SEC misconduct affecting the enforceability of third-party subpoenas, then the court would order notice of third-party subpoenas.

On a target's application for notice, even if the target meets the foregoing conditions, the Court in balancing the equities may nevertheless refuse to order notice if it finds a likelihood that the target would use notice of third-party subpoenas to destroy documents, intimidate witnesses, or otherwise obstruct the investigation.

ceptable. Allegations of agency misconduct are easy to make. A rule requiring that notice be given to any "target" who makes such charges would be no better than the court of appeals' blanket notice requirement, since virtually any person whose conduct is subject to a Commission investigation "could make the claim[s] that [respondents] ha[ve] made" here. *FTC v. Standard Oil Co.*, 449 U.S. 232, 243 (1980). Moreover, forcing the Commission to litigate such charges, as O'Brien's procedure would require, would divert the Commission's resources and disrupt its investigations. See *Hannah v. Larche*, 363 U.S. at 443.

Finally, loose references to the court of appeals' "equitable powers" and its power to prevent abuse of judicial process also cannot support the judgment below. (And again, the court of appeals did not rest its decision on either of those bases.) Respondents have not shown that any constitutional or statutory provision requires the Commission to provide notice of third-party subpoenas, and in the absence of any proven violations "equity" surely does not authorize a court to manufacture novel procedural requirements and impose them upon an independent regulatory agency. Likewise, a court's authority with respect to its own process cannot justify the judgment below, which requires the SEC to provide "targets" with notice of third-party subpoenas even when judicial process has not been sought.

This Court just recently reiterated the principle that courts should not restrict federal agencies' investigative powers "absent unambiguous directions from Congress." *United States v. Arthur Young & Co.*, No. 82-687 (Mar. 21, 1984), slip op. 10. The Court stated (*ibid.*) that "[i]f the broad latitude granted to [an agency] is to be circumscribed, that



is a choice for Congress, and not this Court, to make." The Court rejected (*id.* at 13) the notion, embraced by the court of appeals (Pet. App. 7a), that "fundamental fairness" may limit an agency's investigative powers. It emphasized that courts are not free to fashion remedies based on their own balancing of competing public policies (*Arthur Young & Co.*, slip op. 14-15). Instead, the Court said, "[t]his kind of policy choice is best left to the Legislative Branch." *Id.* at 15.

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE  
*Solicitor General*

DANIEL L. GOELZER  
*General Counsel*  
*Securities and Exchange Commission*

APRIL 1984



MOTION FILED  
FEB 23 1984

No. 83-751

*In the Supreme Court of the United States*

OCTOBER TERM, 1983

---

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
*Petitioners,*

vs.

JERRY T. O'BRIEN, INC., ET AL.,  
*Respondents.*

---

On Appeal from The United States Court of Appeals  
For the Ninth Circuit

---

**MOTION FOR LEAVE TO FILE BRIEF AND  
BRIEF FOR NORTH AMERICAN SECURITIES  
ADMINISTRATORS ASSOCIATION, INC.,  
AS AMICUS CURIAE**

---

MICHAEL P. COX  
300 Timberdell Road  
Norman, Oklahoma 73019  
*Counsel, North American Securities  
Administrators Association, Inc.*

*of Counsel:*

JOSEPH C. LONG, Special Counsel  
North American Securities  
Administrators Association, Inc.

MICHAEL UNGER  
Director, Securities Division  
State of Massachusetts and President  
North American Securities Administrators  
Association, Inc.

ROYCE O. GRIFFIN  
Securities Commissioner  
State of Colorado and Chairman,  
North American Securities Administrators  
Association, Inc. — Enforcement Section

---

**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE**

The North American Securities Administration Association, Inc. (NASSA), a national organization whose membership includes the securities law administrators of the Fifty States, the District of Columbia, Puerto Rico, and Guam, hereby respectfully moves for leave to file the attached brief, as *amicus curiae*, in this case. The consent of the Solicitor General for the Petitioners has been obtained. The consent of the attorneys for the Respondents was requested but was neither granted nor opposed.

The interest of NASAA in this case arises from the fact that all its members are charged with the enforcement of the securities laws of the various states. Thirty-nine of these jurisdictions have the Uniform Securities Act which is similar to the Securities Act of 1933 and the Securities Exchange Act of 1934. Section 407 of the Uniform Securities Act is based upon Sections 21(a)-(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(a)-(d). Section 407(a) authorizes the Administrator to make public and private investigations and Section 407(b) authorizes him to issue subpoenas in support of those investigations. The remaining fourteen members have enforcement provisions in their statutes similar to those of the Securities Exchange Act and the Uniform Securities Act. NASAA has conducted an annual survey of enforcement actions brought under these provisions. This survey shows that during the fiscal year 1982, the twenty-nine states which reported, conducted 2,867 investigations. During the fiscal year 1983, with thirty states reporting, the survey shows that 3,061 investigations were conducted. Finally, for the fiscal year 1984 to date, with thirty-one jurisdictions re-

porting, the survey shows that 3,363 investigations have been conducted.

These numbers plus the close similarity between the statutes and procedures which are the subject of the present case and those of the NASAA members indicate that the decision of the Court in this case will have a very great impact upon the ability of the member states to continue to enforce effectively their securities acts. To NASAA's knowledge, the issue has already been raised in at least two state securities enforcement cases. See, *State v. Ludwig*, Cause No. 83-1-01483-4 (Wash.Super., Pierce County, 1984); *State v. Montgomery*, Cause No. 83-1-01700-5 (Wash.Super., King County, 1984). In both these cases the trial judges in oral opinions from the bench refused to follow the lower court's decision in the present case in favor of the reasoning of the court in *Pepsico v. SEC*, 563 F.Supp. 828 (S.D. N.Y. 1983). Both state cases are still pending so no appeal has yet been taken.

Because the case will heavily impact upon the enforcement program of its members, NASAA would like the opportunity through the attached brief to present the Court with its views as an *amicus curiae*.

Respectfully submitted,

  
MICHAEL P. COX

300 Timberdell Road  
Norman, Oklahoma 73019

Counsel for North American  
Securities Administrators Association, Inc., as *Amicus Curiae*

Dated: Norman, Oklahoma  
February 22, 1984

## TABLE OF CONTENTS

	PAGE
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
POINT I: Federal agencies, and in particular the SEC, are not generally required by federal statutory law to notify "targets" of non-public investigations when subpoenas are issued to third parties	5
POINT II: Federal agencies, and in particular the SEC, are not required by the Due Process Clause of the Fifth Amendment, U.S. Constitution, to notify "targets" of non-public investigations when subpoenas are issued to third parties	13
POINT III: Federal agencies, and in particular the SEC, are not required by the Fourth Amendment, U.S. Constitution, to notify "targets" of non-public investigations when subpoenas are issued to third parties	16
POINT IV: Federal agencies, and in particular the SEC, are not required by <i>United States v. Powell</i> , 329 U.S. 48 (1964), to notify "targets" of non-public investigations when subpoenas are issued to third parties	20
CONCLUSION	24

# TABLE OF AUTHORITIES

Cases	PAGE(S)
<i>Camara v. Municipal Court</i> , 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) .....	17
<i>Cudahy Packing Co. v. Holland</i> , 315 U.S. 357 (1942) ....	21
<i>Donaldson v. United States</i> , 400 U.S. 517 (1971) .....	17
<i>Donovan v. Lone Steer, Inc.</i> , .... U.S. ...., 52 U.S.L.W. 4087 (Jan. 17, 1984) .....	23
<i>FCC v. Pottsville Broadcasting Co.</i> , 309 U.S. 134 (1940) .....	26
<i>FCC v. Schreiber</i> , 381 U.S. 279 (1965) .....	26
<i>FTC v. Grolier Incorporated</i> , .... U.S. ...., 103 S.Ct. 2209 (1983) .....	8
<i>Hannah v. Larche</i> , 363 U.S. 420 (1960) .....	3, 4, 13, 14, 15, 16, 24
<i>Jerry T. O'Brien, Inc., et al. v. SEC, et al.</i> , 719 F.2d 300 (9th Cir. 1983) .....	3, 15, 25
<i>Jerry T. OBrien, Inc., et al. v. SEC, et al.</i> , 704 F.2d 1065 (9th Cir. 1983) .....	6, 20
<i>Marshall v. Barlow's, Inc.</i> , 436 U.S. 307 (1978) .....	16, 18
<i>Oklahoma Press Publishing Co. v. Walling</i> , 327 U.S. 186 (1946) .....	16
<i>Pepsico v. SEC</i> , 563 F.Supp. 828 (S.D.N.Y. 1983) .....	2
<i>Rakas v. Illinois</i> , 439 U.S. 128 (1978) .....	17
<i>See v. City of Seattle</i> , 387 U.S. 541 (1967) .....	16
<i>State v. Ludwig</i> , Cause No. 83-1-01483-4 (Wash.Super., Pierce County, 1984) .....	2
<i>State v. Montgomery</i> , Cause No. 83-1-01700-5 (Wash. Super., King County, 1984) .....	2
<i>United States v. Powell</i> , 379 U.S. 48 (1964) .....	3, 4, 20, 21, 23, 24, 27

**AUTHORITIES CONTINUED**

**PAGE(S)**

<i>Vermont Yankee Nuclear Power v. Natural Resources Nuclear Power Corporation</i> , 415 U.S. 519 (1978) .....	26
<i>Wedbush, Noble, Cooke, Inc. v. SEC</i> , 714 F.2d 923 (9th Cir. 1983) .....	3, 15
<i>Wedbush, Noble, Cooke, Inc. v. SEC</i> , No. CV-83-3961 CBM (KX) (C.D.Cal. July 11, 1983) .....	3, 15
<i>Wyman v. James</i> , 400 U.S. 309 (1971) .....	18
<i>Zurcher v. The Stanford Daily</i> , 435 U.S. 547 (1978) .....	18-19

**United States Constitution**

Fourth Amendment .....	19, 24
Fifth Amendment, Due Process Clause .....	15, 24

**Statutes Cited**

**Administrative Procedure Act**

5 U.S.C. §§ 551 <i>et seq.</i> .....	4, 5
§ 553 .....	26
§ 555 .....	6, 11, 22
§ 555(c) .....	5, 22
§ 555(d) .....	5, 22

**Federal Open Meetings Law**

5 U.S.C. § 552b .....	8
§ 552b(c) (7) .....	9
§ 552b(c) (9) .....	9
§ 552b(c) (10) .....	9

**Freedom of Information Act**

5 U.S.C. § 552(a) (3)-(e) .....	8
§ 552(b) (3) .....	8
§ 552(b) (5) .....	8
§ 552(b) (7) .....	8

**"Government in the Sunshine" Act: see Federal Open Meetings Act .....**

**9**

<b>Investment Advisors Act of 1940, 15 U.S.C. § 80b-9(b)</b> .....	<b>5</b>
--	----------

**AUTHORITIES CONTINUED**

**PAGE(S)**

Investment Company Act of 1940, 15 U.S.C. § 80a-40 (b) .....	5
Privacy Act	
5 U.S.C. § 552a .....	8
§ 552a(d) (1) .....	8
§ 552a(d) (5) .....	8
Public Utility Holding Company Act, 15 U.S.C. § 79r(c) .....	5
Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 (1), (5) .....	6
Securities Act of 1933	
15 U.S.C. §§ 77a et seq. ....	2
§ 77s(b) .....	5
Securities Act of 1934	
15 U.S.C. §§ 78a et seq. ....	2
§ 78u(a)-(c) .....	5
§ 78u(c) .....	6, 12
§ 78u(h) .....	6
Trust Indenture Act of 1939, 15 U.S.C. § 77uuu(a) ..	5
26 U.S.C. (& Supp. V) § 7609 .....	6, 12

**Proposed Legislation**

H.R. 746 ("Regulatory Procedures Act") [97th Cong.]	11
S. 1080 ("Regulatory Reform Act") [97th & 98th Cong.] .....	11

**Congressional Record**

92 Cong. Rec. 5648 (1946) .....	13
---------------------------------	----

**Code of Federal Regulations**

1 CFR § 305.70-4 .....	7
1 CFR § 305.74-1 .....	7

**AUTHORITIES CONTINUED**

<b>Other Authorities</b>	<b>PAGE(S)</b>
Administrative Conference of the United States:	
Commentary, 1 Recommendations and Reports of the Administrative Conference of the United States 584 (1970) .....	7
Recommendation 30 (S.Doc.No. 24, 88th Cong., 1st Sess. (1963)) .....	7
Recommendation 70-4 (1 CFR § 305.70-4) .....	7
Recommendation 74-1 (1 CFR § 305.74-1) .....	7
Attorney General's Manual on the Administrative Procedure Act (1947) .....	13, 22
Hearings of the Subcommittee on Administrative Law and Governmental Relations of the Committee of the Judiciary, 97th Cong., 1st Sess., on H.R. 746 (Regulatory Procedures Act) (Serial No. 27, 1981) ..	10
Model State Administrative Procedure Act (1981) .....	11
Summary of Actions of the House of Delegates (Mid- year) (ABA, 1981) .....	10
Uniform Securities Act .....	2
1976 U.S. Code Cong. and Ad. News 2223 .....	8



No. 83-751

---

In the  
Supreme Court of the United States  
OCTOBER TERM, 1983

---

SECURITIES AND EXCHANGE COMMISSION, ET AL.,  
*Petitioners,*

vs.

JERRY T. O'BRIEN, INC., ET AL.,  
*Respondents.*

---

**BRIEF FOR THE NORTH AMERICAN SECURITIES  
ADMINISTRATORS ASSOCIATION, INC.,  
AS AMICUS CURIAE**

---

**INTEREST OF AMICUS CURIAE**

The North American Securities Administrators Association, Inc. (NASAA) is a non-profit voluntary membership corporation. Membership in NASAA is open to all state and provincial securities regulators and agencies in the United States, Canada, and Mexico. Presently its membership includes the state officials charged with enforcing the state securities laws of all the states, the District of Columbia, Puerto Rico, and Guam as well as all the Canadian provinces. The purpose of the organization is to deal with issues of common interest, to further the enforcement of the state blue sky laws, and to coordinate such state statutes with the federal securities laws by cooperating with the Securities and Exchange Commission (SEC) in the areas of mutual interest.

The present case deals with the investigatory and subpoena power of the Securities and Exchange Commission. As noted in its Motion for Leave to File Brief *Amicus Curiae*, thirty-nine of the NASAA members are charged with the enforcement of the Uniform Securities Act. This statute is based heavily upon the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.* and the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.* Sections 407(a) and (b) of this statute are drawn from Section 21(a)-(d) of the Exchange Act which are the subject matter of the present case and allow the state securities administrators to conduct investigations similar to those conducted by the SEC and to issue subpoenas in support of those investigations. Also as noted in its Motion, NASAA's records show that its member agencies have conducted more than 9,000 investigations during the last three fiscal years. As a result NASAA and the state member agencies play a very large role in the enforcement of the securities laws of the country.

Because of the nature of their enforcement role and the close similarity of the statutes in the present case and those which NASAA members are charged with enforcing, the present case will have heavy impact upon the NASAA membership. In fact, the Ninth Circuit's opinion has already been the basis for motions by two defendants in state securities enforcement actions. See *State v. Ludwig*, Cause No. 83-1-01483-4 (Wash.Super. Pierce County, 1984) and *State v. Montgomery*, Cause No. 83-1-01700-5 (Wash.Super., King County, 1984). In both of these cases, the trial judge in oral opinions from the bench refused to follow the Ninth Circuit's decision in the present case in favor of the decision in *Pepsico v. SEC*, 563 F.Supp. 828 (S.D.N.Y. 1983).

### SUMMARY OF ARGUMENT

The court below held that "targets" of subpoenas issued to third parties by the Securities and Exchange Commission (SEC) have a right to receive notice of these subpoenas so that a "target" would have an opportunity to assure that an investigation was being conducted consistently with the standards set out by this Court in *United States v. Powell*, 379 U.S. 48 (1964). The lower court erred because the *Powell* standards do not apply to agency investigations *per se*, but only to *judicial enforcement* of agency subpoenas. As the SEC had not requested enforcement of the subpoenas in the case below, application of the *Powell* standards was premature.

Because the Court of Appeals for the Ninth Circuit denied the petition for rehearing *en banc* (719 F.2d 300 (9th Cir. 1983)), the judgment of the lower court not only is available as precedent, but has already been used as such (*Wedbush, Noble, Cooke, Inc. v. SEC*, No. CV-83-3961 CBM (KX) (C.D.Cal. July 11, 1983, 714 F.2d 923 (9th Cir. 1983))). *Wedbush* imposed similar requirements on the SEC as the court below; however, the *Wedbush* court cast its decision in constitutional terms, i.e., notice to "targets" of third party subpoenas is required by the Due Process Clause of the Fifth Amendment, U.S. Constitution. As the holding of the lower court has already been expanded beyond its original rationale, that is, from being judicially required to constitutionally required, the issues have become more myriad.

This Court in the landmark case of *Hannah v. Larche*, 363 U.S. 420 (1960), a case also involving a challenge to the investigatory procedures of an agency, approached the

legal sufficiency of the administrative procedures from three aspects: Was the procedure authorized by the Congress? Was the procedure constitutionally firm? And, was the procedure consistent with the decisions of the Court? NASAA forcefully asserts that all three inquiries should be answered in this case, as they were in *Hannah*, in the affirmative.

A review of the federal Administrative Procedure Act (APA), codified as 5 U.S.C. §§ 551 *et seq.*, its legislative history, subsequent admendments to the APA, and current regulatory reform efforts in the Congress, as well as of specific statutes authorizing not only the SEC but other agencies to issue third party subpoenas, is informative. These sources clearly demonstrate that federal statutory law authorizes the SEC to subpoena the information in the case below *without* notifying the "targets" of the issuance of the subpoenas to third parties. Likewise, decisions of this Court relating to constitutional challenges to administrative subpoenas (not only those raising Fifth Amendment issues but also involving Fourth Amendment issues) do not support the requirement imposed by the court below. Finally, a careful evaluation of *United States v. Powell*, together with further analysis of the structure and legislative history of the APA, indicate that the *Powell* standards are not "triggered" until an agency invokes the judicial process by seeking enforcement of a subpoena in a federal court. The scope of administrative investigation and subpoenas prior to judicial involvement is matter for determination by the Congress, subject to Constitutional limitations.

Because the "target"-notice requirement imposed on the SEC by the court below has no foundation either in the Constitution or in federal statutes and is not required

by the decisions of this Court, the judgment of the court below should be reversed.

### POINT I

**Federal agencies, and in particular the SEC, are not generally required by federal statutory law to notify "targets" of non-public investigations when subpoenas are issued to third parties.**

Administrative process, whether federal or state, is structured around the applicable Administrative Procedure Act (APA) which imposes general procedures to be followed by agencies. The federal APA was passed unanimously by both House of Congress in 1946 (60 Stat. 237 (1946)) and is currently codified as 5 U.S.C. §§ 551 *et seq.* The APA's original investigation (§ 6(b)) and subpoena (§ 6(c)) sections have remained essentially the same as originally enacted and are codified as 5 U.S.C. § 555(c), (d). Section 6(b) currently provides: "Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law." (5 U.S.C. § 555(c)). Section 6(c) authorizes under particular circumstances agency subpoenas to be issued to a party, as well as judicial enforcement of subpoenas. (5 U.S.C. § 555(d)). This general outline of agency investigatory subpoena power has been expanded further by the Congress in specific statutes directed at individual agencies. With regard to the SEC, see, *e.g.*, Securities Act of 1933 (15 U.S.C. § 77s(b)); Securities Exchange Act of 1934 (15 U.S.C. § 78u(a)-(c)); Public Utility Holding Company Act (15 U.S.C. § 79r(c)); Trust Indenture Act of 1939 (15 U.S.C. § 77uuu(a)); Investment Company Act of 1940 (15 U.S.C. § 80a-40(b)); and Investment Advisers Act of 1940 (15

U.S.C. § 80b-9(b)). These specific statutes do not require the SEC to notify "targets" of third-party subpoenas.

In a few instances, however, the Congress has required an agency to provide notice to "targets" of third-party subpoenas. For example, the SEC (as well as other agencies) are required to notify "targets" under the Right to Financial Privacy Act of 1978 (12 U.S.C. § 3401(1), (5)) (particular customers of specified financial institutions). See 15 U.S.C. § 78u(h); see also 26 U.S.C. (& Supp. V) § 7609 (procedures for notice of IRS third-party subpoenas). The comparison is significant. Because the Congress has, in fact, included a requirement for notice to "targets" of third-party subpoenas in particular statutes, one must assume that Congress is aware of the significance of the requirement and the policies involved: protecting the interests of the "target" versus maintaining the "integrity of the investigation." (*Jerry T. O'Brien, Inc., v. SEC, et al.*, 704 F.2d 1065, 1069 (9th Cir. 1983)). Because the particular statute (15 U.S.C. § 78u(c)) called into question by the lower court's decision does not require notice to "targets" of third-party subpoenas and because no indication exists that the SEC has otherwise bound itself by regulation to provide such notice, a conclusion begins to emerge: The Congress has not imposed a "target"-notice requirement applicable in this instance.

Although 15 U.S.C. § 78u(c) does not itself require notice, the APA itself must be examined to determine whether the Congress has imposed a general requirement in Section 6, APA (5 U.S.C. § 555) that notice be given to "targets". Not only does the language of Section 6 (§ 555) fail to reveal any verbage even closely related to the matter, subsequent events reinforce the conclusion that no Congressional

intent appears to exist that a general "target"-notice requirement is contained in the APA.

In the past twenty-two years, the Administrative Conference of the United States (ACUS) has forwarded to the Congress two recommendations on discovery: Recommendation 30 (S. Doc. No. 24, 88th Cong., 1st Sess. (1963)) and Recommendation 70-4 (1 CFR § 305.70-4) and one Recommendation on agency subpoenas: Recommendation 74-1 (1 CFR § 305.74-1). None of these Recommendations for amendment of the APA suggests that an agency is to notify a "target" of third-party subpoenas during the investigatory stage of an agency inquiry. To the contrary, Recommendation 70-4 (Discovery in Agency Adjudication) in paragraph 8 states:

(b) *Names of Witnesses.* The presiding officer should have the authority upon motion by a party or other person, and for good cause shown, by order: (a) To restrict or defer disclosure by a party of the name of a witness, a narrative summary of the expected testimony of a witness or, in the case of an agency witness, any prior statement of the witness, and (b) to prescribe other appropriate measures to protect a witness. [By definition, "party" would include the agency itself. See Commentary, 1 Recommendations and Reports of the Administrative Conference of the United States 584 (1970).]

If the identities of third parties to whom subpoenas had been issued were already required to be released to "targets" during an agency investigation, the necessity for a protective order such as that recommended by ACUS would be moot, at least with regard to protecting a witness. The Recommendation, therefore, suggests that at least in 1970

no general requirement existed in the APA that "targets" be notified of investigatory third-party subpoenas.

Since the passage of the APA in 1946, three major pieces of legislation have been enacted by the Congress affecting public information: The Freedom of Information Act [FOIA] (5 U.S.C. § 552(a)(3)-(e)); the Privacy Act (5 U.S.C. § 552a); and the Federal Open Meetings Law (5 U.S.C. § 552b). If these statutes are examined, one discovers that each has provisions designed to protect the integrity of agency investigations. For example, the FOIA permits an agency to decline a request for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency" (5 U.S.C. § 552(b)(5)) and for "investigatory records compiled for law enforcement purposes. . . ." (5 U.S.C. § 552(b)(7)). The Court only recently strengthened the "work-product" exemption (5 U.S.C. § 552(b)(5)) in *FTC v. Grolier Incorporated*, \_\_\_\_\_ U.S. \_\_\_\_\_, 103 S.Ct. 2209 (1983).

Under the Privacy Act, an agency generally must grant access to an individual to a record contained in a system of records which includes information about the individual (5 U.S.C. § 552a(d)(1)); however, "nothing in this section [i.e., the Privacy Act] shall allow an individual access to any information compiled in *reasonable anticipation* of a civil action or proceeding." (Emphasis added) (5 U.S.C. § 552a(d)(5)). This Privacy Act exemption interrelates with another exemption of the FOIA, i.e., 5 U.S.C. § 552(b)(3) ("specifically exempted from disclosure by statute. . .").

The Federal Open Meetings Law (also known as the "Government in Sunshine Act") permits an agency subject to the Law (which the SEC is (see 1976 U.S. Code Cong.



and Ad. News 2223)) to conduct its meetings in executive session if the meeting “specifically [concerns] the agency’s issuance of a subpoena, or the agency’s participation in a civil action or proceeding. . . .” (5 U.S.C. § 552b(c)(10)). See also 5 U.S.C. § 552b(c)(9) which permits executive sessions for an agency which regulates, *inter alia*, securities if a matter at the meeting might lead to significant financial speculation or endanger the stability of a financial institution. This exemption permits *any* agency subject to the Law to go into executive session if information at the meeting would frustrate significantly the implementation of a proposed agency action. The “Government in Sunshine” Act contains a third, relevant exemption (i.e., one that would permit an executive session) which is similar to the law enforcement exemption contained in the FOIA. See 5 U.S.C. § 552b(c)(7) (“disclose investigatory records compiled for law enforcement purposes . . . but only to the extent that the production of such records . . . would . . . (D) disclose the identity of a confidential source. . . .”).

Although these three statutes — the FOIA, the Privacy Act, and the “Government in the Sunshine” Act (all arguably part of the APA) — relate to agency release of information to the public (with consideration for privacy), each one includes exemptions from its application to preserve the integrity of investigatory function of agencies. These exemptions are inconsistent with a theory that under the APA an agency must provide notice to a “target” of the identities of third parties who have been subpoenaed.

Further indication of a lack of Congressional intent to subject federal agencies to a general APA requirement of notifying “targets” of third-party subpoenas involves an

action by the American Bar Association House of Delegates at its 1981 mid-year meeting held in Houston, Texas. The House of Delegates adopted a Recommendation to "support enactment of legislative proposals to amend the Administrative Procedure Act (APA) with respect to compulsory process: . . . D. To provide that persons other than the recipient of process who are the principal targets of an investigation are provided notice when a process seeks documents directly relating to their affairs. . . ." (Summary of Actions of the House of Delegates 10, 11 (ABA 1981).) This Recommendation was brought to the attention of the Congress on April 2, 1981, in testimony presented to the Subcommittee on Administrative Law and Governmental Relations of the Committee of the Judiciary, House of Representatives, during the First Session of the 97th Congress. The Subcommittee was holding hearings on H.R. 746 ("Regulatory Procedures Act of 1981"). Included in the record of these Hearings (Serial No. 27) is the ABA Report which accompanied the Recommendation, a portion of which explained (Hearings at 130):

This provision is addressed to the not infrequent situation in which an agency seeks documents, such as bank records, held by a third party concerning the target of its investigation. An investigative target is powerless to invoke his rights unless he knows of the demand, and the person on whom the process is served may not have a sufficient incentive to challenge the process or to notify the individual in question. This recommendation would give the investigative target the ability to protect himself.

This recommendation applies only to compulsory processes issued by an agency and not to any form of judicial process. The agency may, therefore, still use

an appropriate form of judicial process if it believes it is essential to secure records on an individual without providing notice to that individual. . . .

The significance of the Recommendation is twofold: First, that the ABA believed it necessary to amend the APA to impose such a requirement and second, that despite having the concept brought to its attention, the Subcommittee did not include the Recommendation in H.R. 746 (introduced in *both* sessions of the 97th Congress). H.R. 746 did contain, however, other amendments to the investigation-and-subpoena section of the APA (5 U.S.C. § 555). In addition, S. 1080 ("The Regulatory Reform Act") which passed the Senate by 94-0 on March 24, 1982, but was not voted on by the House, has been reintroduced in the 98th Congress. S. 1080 did not (97th Congress) and does not (98th Congress) recommend any amendments to the APA relating to notice to "targets" of third party subpoenas.

The implication of this Congressional activity seems clear. At least the House of Representatives, and most likely the Senate, are aware of the ABA's Recommendation that the APA be amended to provide that notice be given to "targets" of third-party subpoenas. For whatever reason, the requirement was not included in either H.R. 746 or S. 1080.

Although not directly relevant, an additional observation should be made. One of the most recent and comprehensive evaluations of administrative process and what procedures should govern administrative agencies is the Model State Administrative Procedures Act (1981) which was approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform

State Laws. This Act does not include in its subpoena provisions any requirement that notice be given to "targets" of third-party subpoenas.

If one examines the APA as originally enacted, the subsequent amendments of the APA relating to release of information (with carefully drawn exemptions from release designed to protect the integrity of the investigatory function of agencies), and the recent Congressional activity concerning regulatory reform, one cannot help but conclude that the Congress did not originally and has not subsequently included in the APA a general principle that agencies must notify "targets" of third-party subpoenas. The conclusion to be drawn therefore, is that except for those few instances (*e.g.*, 26 U.S.C. (& Supp. V) § 7609) where express language imposes a "target"-notice requirement, such a requirement does not exist in federal statutory law. As a consequence, because no general requirement that notice be given is included in the APA and because the statute called into question by the court below (15 U.S.C. § 78u(c)) is not one of the statutes in which the Congress has expressly placed the notice requirement, the SEC was not (and is not) required by federal statutory law to notify "targets" of non-public investigations when subpoenas are issued to third parties.

## POINT II

**Federal agencies, and in particular the SEC, are not required by the Due Process Clause of the Fifth Amendment, U.S. Constitution, to notify "targets" of non-public investigations when subpoenas are issued to third parties.**

Although the format of the federal Administrative Procedure Act (APA) is structured around the dichotomy of rule making versus adjudication (Attorney General's Manual on the Administrative Procedure Act 14 (1947)), agencies clearly perform functions not within either classification. For example, Representative Walter, one of the moving forces with regard to the APA's adoption, singled out the investigatory function as being separate and distinct from that of rule making and adjudication (92 Cong. Rec. 5648 (1946)). This Court, in the landmark case of *Hannah v. Larche*, 363 U.S. 420 (1960), confirmed the separate status of investigations in the administrative process. The distinction is not without significance (*Hannah* at 442):

[A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents [e.g., identity of complainants] need not be conferred upon those appearing before purely investigative agencies.

After these initial comments, the *Hannah* Court explored in general the investigatory function of agencies (*Hannah* at 445-46):

The history of investigations conducted by the executive branch of the Government is also marked by a decided absence of those procedures here in issue. The best example is provided by the administrative regulatory agencies. Although these agencies normally make determinations of a quasi-judicial nature, they also frequently conduct purely fact-finding investigations. When doing the former, they are governed by the Administrative Procedure Act, and the parties to the adjudication are accorded the traditional safeguards of a trial. However, when these agencies are conducting nonadjudicative, fact-finding investigations, rights such as appraisal, confrontation, and cross-examination generally do not obtain . . . (Footnotes and citations omitted.)

The Court then acknowledged that the SEC, although not an executive agency, is an investigatory body of this type (*Hannah* at 446-48):

Another regulatory agency which distinguishes between adjudicative and investigative proceedings is the Securities and Exchange Commission. This Commission conducts numerous investigations. . . . Although the Commission's Rules provide that parties to adjudicative proceedings shall be given detailed notice of the matters to be determined and a right to cross-examine witnesses appearing at the hearing, those provisions of the Rules are made specifically inapplicable to investigations, even though the Commission is required to initiate civil or criminal proceedings if an investigation discloses violations of law. Undoubtedly, the reason for this distinction is to prevent the sterilization of investigations by burdening them with trial-like procedures. (Footnotes and citations omitted).

The issue before this Court is not every aspect of SEC investigations, but rather a single feature, i.e., whether notice must be given to "targets" of non-public investigation when subpoenas are issued to third parties. Applying the rationale of *Hannah* by analogy, one is logically drawn to the conclusion that if a "target" of an investigation does not have to be apprised of the names of complainants under the Due Process Clause of the Fifth Amendment, *a fortiori* a "target" of a subpoena need not be supplied under that Clause with the names of third parties, who are not even necessarily complainants, on whom the subpoenas have been served.

Although the court below did not utilize the Due Process Clause of the Fifth Amendment in reaching its decision, a second case, relying on the judgment below as precedent, held that there is a "due process right to notice of third party subpoenas." *Wedbush, Noble, Cooke, Inc. v. SEC*, No. CV-83-3961 CBM (KX) (C.D.Cal. July 11 1983). The Court of Appeals for the Ninth Circuit declined to issue an emergency stay of the *Wedbush* court's "injunction against continuation of the investigation without notification to ["targets"] of the third-parties subpoenaed by the SEC." The Court of Appeals found that "*O'Brien* . . . is . . . final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court." *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923, 924 (9th Cir. 1983). The Court of Appeals for the Ninth Circuit has declined to hear *O'Brien* en banc (*Jerry T. O'Brien, Inc. v. SEC*, 719 F.2d 300 (9th Cir. 1983)). The lower court's decision, therefore, remains as precedent to be used in decisions even more far-reaching than *Wedbush*. The effect of *O'Brien*, and its pro-

geny *Wedbush*, are squarely in conflict with the analysis of *Hannah*. Not only should the lower court's judgment be reversed, but the additional due process rationale of *Wedbush* should be discredited. In addition to using the rationales of *O'Brien* and *Wedbush*, subsequent lower courts may attempt to extend the *Wedbush* due process approach into new territory (much as *Wedbush* extended the *O'Brien* rationale), e.g., find a Fourth Amendment requirement to notify "targets" of third-party subpoenas. The *O'Brien* Pandora's box should be immediately closed by this Court to avoid further extensions of the lower court's "target"-notice requirement.

### POINT III

**Federal agencies, and in particular the SEC, are not required by the Fourth Amendment, U.S. Constitution, to notify "targets" of non-public investigations when subpoenas are issued to third parties.**

This Court has made an analogy between the "investigative functions performed by the administrative subpoena and the demand for entry" (*See v. City of Seattle*, 387 U.S. 541, 545 (1967)) by characterizing a subpoena as a "figurative" or "constructive" search (*Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 202 (1946)). With regard to the functions served by a subpoena and by a warrant, the analogy can be continued. Justice Stevens in his dissent, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 332 (1978), inquired: "What purposes, then, are served by the administrative warrant procedure? The inspection warrant purports to serve three functions: to inform [a person] that the inspection is authorized by the statute, to advise him of the lawful limits of the inspection, and to assure him



that the person demanding entry is an authorized inspector. *Camara v. Municipal Court*, 387 U.S. 523, 532, 87 S.Ct. 1727, 1732, 18 L.Ed.2d 930 [1967]." What purposes, then, are served by an administrative subpoena? The subpoena serves three similar functions: to inform the person being subpoenaed that the request is authorized by statute, to advise him of the lawful limits of this "figurative or constructive" search, and to assure him that the person demanding information is an authorized person. By analogy to the warrant's purposes, one can strongly argue, therefore, that the requirement of a subpoena is for the benefit of the person in possession of information, not for the protection of persons about whom the information might relate (i.e., possible "targets" of the administrative investigation). If this is the case, on what basis may a "target" interject himself in the subpoena process?

In *Rakas v. Illinois*, 439 U.S. 128 (1978), the Court rejected so-called "target" standing by declining to hold that a defendant in a criminal case may "assert that a violation of the Fourth Amendment rights of third party [entitle] him to have evidence suppressed at his trial." (*Id.* at 133) The *Rakas* rejection of "target" standing with regard to search warrants appears to be inconsistent with the Court's prior holding in the analogous situation involving administrative subpoenas. In *Donaldson v. United States*, 400 U.S. 517, 531 (1971), the Court held to the extent that a person "has a protectable interest, as, for example, by way of privilege, or to the extent he may claim abuse of process, [he] may always assert that interest or that claim in due course at its proper place in any subsequent trial." The issue in this case does not necessarily require a reassess-

ment of *Donaldson* in light of *Rakas*; however, it is anomalous that a "victim" of an actual search has no right to complain of possible Fourth Amendment violations while an "alleged" target of a "constructive" search is provided an opportunity to raise potential abuse of process, a process to which he was not even a party.

The analogy between warrants and subpoenas can be made in another area with regard to a "target" interjecting himself in the subpoena process. Administrative warrants, which involve "actual searches", may be obtained *ex parte* (See *Marshall v. Barlow's, Inc.*, 430 U.S. 307, 316 (1977); *Wyman v. James*, 400 U.S. 309, 323 (1971)). Should not "constructive" searches (i.e., administrative subpoenas) be permitted to be carried into effect "ex parte", at least with regard to their possible "targets"? The answer would seem logically to be in the affirmative.

A general requirement under the Fourth Amendment that possible "targets" must be notified of third-party subpoenas would also only exacerbate the concerns raised by the Court in *Zurcher v. The Stanford Daily*, 435 U.S. 547 (1978). The *Zurcher* Court, in authorizing the use of a warrant rather than a subpoena to obtain information from a third party, discussed realistic concerns which are also present in the case before this Court (*Id.* at 561):

The seemingly blameless third party in possession of the fruits or evidence may not be innocent at all; and if he is, he may nevertheless be so related to or so sympathetic with the culpable that he cannot be relied upon to retain and preserve the articles that may implicate his friends, or at least not to notify those who would be damaged by the evidence that the authorities are aware of its location. In any event, it is likely

that the real culprits will have access to the property, and the delay involved in employing the subpoena *duces tecum*, offering as it does the opportunity to litigate its validity, could easily result in the disappearance of the evidence, whatever the good faith of the third party.

As demonstrated, arguments of a constitutional nature, based on the analogy to warrants, can be made against imposition of a Fourth Amendment requirement that "targets" be notified of third-party subpoenas. Beyond that, however, practical considerations such as those raised in *Zurcher* also suggest that this type of requirement would be unwise by increasing the threat to the integrity of the administration investigatory function. In addition to raising succinctly the inherent threat to the integrity of an investigation occasioned by use of third-party subpoenas, the *Zurcher* Court strongly implied that "targets" are not generally aware of issuance of subpoenas: "The seemingly blameless third party in possession of . . . evidence . . . cannot be relied upon . . . not to notify those who would be damaged by the evidence [i.e., the 'targets'] that the authorities are aware of its location." (*Zurcher* at 561.)

Because of the precedents of this Court interpreting the Fourth Amendment as it relates to warrants, one can reason by analogy that no "target"-notice requirement is imposed by the Fourth Amendment with regard to subpoenas. This conclusion is reinforced by the practical considerations raised in *Zurcher v. The Stanford Daily*.

#### POINT IV

Federal agencies, and in particular the SEC, are not required by *United States v. Powell*, 329 U.S. 48 (1964), to notify "targets" of non-public investigations when subpoenas are issued to third parties.

The underlying premise of the holding of the court below is that "targets of the investigation [do] have a right to be investigated consistently with the *Powell* standards. Cf. *Powell*, 379 U.S. at 57-58." (*Jerry T. O'Brien, Inc. v. SEC*, 704 F.2d 1065, 1068 (9th Cir. 1983)). When one checks *Powell* at the pages indicated, no such requirement is revealed. The *Powell* Court on these pages discusses the circumstances under which an agency is entitled to avail itself of judicial enforcement of the agency's subpoenas (*Powell v. United States*, 379 U.S. 48, 58 (1964)):

It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. (Footnote omitted.)

Before an agency applies to a court for enforcement of a subpoena, however, the integrity of the court's process is not directly involved. The agency, rather, is carrying out its investigatory function as defined by the Congress and implemented by agency rules, subject to Constitutional limitations.

If every agency request for information were required to satisfy the four-part *Powell* test (*Powell* at 57-58), the agency investigatory function might be hindered. Prior to

enforcement by a court, an administrative summons is, in fact, only a request for information, albeit a request with potential for coercion (See *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 363 (1942)). The fact remains, however, that in most circumstances an administrative summons may be ignored.

Why should the scope of agency inquiries for information be limited to that defined by considerations relevant to whether a court will permit its process to be used? Obviously an agency might abuse its investigatory function, but that is not the issue before the Court. Allegations of that nature can be brought another day in another forum. The issue presented by the court below is: Do targets of investigations have a right to be investigated consistently with the *Powell* standards? (O'Brien at 1068). The appropriate answer would seem to be that as long as an agency stays within the authority granted by the Congress (and as defined by its own regulations) and does not act unconstitutionally, investigations (to include requests for information either from "targets" or from third parties) may be conducted without regard to the *Powell* standards. If, however, an agency desires to invoke a federal court's process to obtain information, the request must comport with the criteria established by this Court, i.e., the *Powell* standards.

The rationale of the lower court that *Powell v. United States* prescribes standards with which agencies must comply in conducting investigations is without basis. *Powell* relates to enforcement of a subpoena, not to how agencies in general are to perform their investigatory function. That

is a matter for the Congress and the agency to decide, subject to constitutional limitations.

The structure of Section 6 of the APA (5 U.S.C. § 555) adds support to the conclusion that the law governing administrative investigations is different from the law relating to judicial enforcement of agency subpoenas. Section 6(b) contains the basic statement relating to an agency's investigatory powers: "Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law." (5 U.S.C. § 555(c)). The provision relating to judicial enforcement is contained in Section 6(c) (5 U.S.C. § 555(d)). Clearly the drafters of the APA were separating the two subjects: issuance of investigatory subpoenas and judicial enforcement of those subpoenas.

This interpretation is supported by the Attorney General's Manual on the Administrative Procedure Act, 68-69 (1947):

The second sentence of section 6(c) [5 U.S.C. § 555(d)] provides that "Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law . . . ." Upon its face, the subsection in requiring judicial enforcement of subpoenas "found to be in accordance with law" is a reference to and an adoption of the existing law with respect to subpoenas. For example, nothing in section 6(c) seems intended to change *existing law as to the reasonableness and scope of subpoenas*. Similarly, the subsection leaves unchanged *existing law as to the scope of judicial inquiry where enforcement of a subpoena is sought* . . . . Nothing in the language of section 6(c) suggests any purpose to change this established rule. It is said only that the court shall enforce a subpoena "to the extent that it is found to be in ac-

cordance with law." "Law" refers to the statutes which a particular agency administers, together with relevant judicial decisions. (Emphasis added)

Two separate issues are addressed: (1) the "existing law as to the reasonableness and scope of subpoenas" and (2) the "existing law as to the scope of judicial inquiry where enforcement of a subpoena is sought." The former, one can argue, is governed by the "statutes which a particular agency administers, together with relevant judicial decisions" which (one can reasonably infer) interpret those statutes. The latter, on the other hand, is a matter of judicial administration and is governed by *Powell*. The *Powell* standards, therefore, should be viewed as applicable only to the "scope of judicial inquiry where enforcement is sought," not to defining the "existing law as to the reasonableness and scope of subpoenas."

If *Powell v. United States* does not require administrative investigations be conducted according to the *Powell* standards, the basis for the lower court's decision evaporates. Because of the language used by the *Powell* Court, which is consistent with the structure and legislative history of the APA, it is argued the *Powell* standards do not require that "targets" of non-public investigations receive notice of issuance of subpoenas to third parties, but rather apply only to judicial enforcement of administrative subpoenas. To paraphrase a recent decision of this Court sustaining an administrative subpoena against a Fourth Amendment challenge: The court below undertook to apply a holding of this Court which does not exist. See *Donovan v. Lone Steer, Inc.*, 52 U.S.L.W. 4087, 4089 (Jan. 17, 1984) ("We think that the District Court undertook to decide a case not before it").

## CONCLUSION

An examination of the Court's opinion in *Hannah v. Larche*, 363 U.S. 420 (1960), discloses an analysis model for evaluating allegations of improper agency investigatory procedures: First, determine whether the "Congress did authorize the Commission to adopt the procedures in question." (*Id.* at 431). Second, "determine whether the Commission's Rules of Procedure are consistent with the Due Process Clause of the Fifth Amendment." (*Id.* at 440).

The first consideration was addressed in Point I, which reviewed general statutory law applicable to agency investigation by subpoena (i.e., the APA) and the specific provisions relating to the SEC. No Congressional intent was identified which requires, as a general principle, an agency (or, in this instance, a requirement for the SEC) to notify "targets" of the identity of persons who are subpoenaed. The second consideration was addressed in Point II. Authority was presented to demonstrate that agency regulations which do not require the identities of third parties be released to "targets" of investigations are not violative of the Due Process Clause of the Fifth Amendment. In addition, discussion in Point III illustrated that such regulations do not violate the Fourth Amendment. A third level of analysis was also used in *Hannah*, although not expressly identified: Do the agency's procedures brought into issue violate decisions of this Court? Although it is the function of this Court to interpret authoritatively its own decisions, Point IV strongly suggests that the investigatory procedures used by the SEC in this case are not precluded by the decisions of this Court, especially *Powell v. United States*.



Once this three-fold analysis is completed and, as here, an agency's investigatory procedure is found to be statutorily authorized, promulgated within that authorization, constitutionally firm, and not precluded by the decisions of this Court, what then is the basis for a decision like that of the court below? The five judges who dissented from the denial by the Court of Appeals of a rehearing en banc stated succinctly what seems to be an obvious conclusion (*Jerry T. O'Brien, Inc. v. SEC*, 719 F.2d 300, 300 (9th Cir. 1983)):

The rule set forth by the panel opinion goes beyond any reasonable interpretation of the Supreme Court's opinions; is an unwarranted extension of, if not in open conflict with, our own opinions; and is an improper intrusion on the administrative function.

There is no principled basis for confining the panel holding to the context of an SEC investigation. It threatens to compromise government investigations by most agencies. Not only will wrongdoers be provided a new instrument of obstruction or delay, but also employees and others subject to reprisals will be chilled from cooperating with investigators. (Citations omitted.)

Less than six years ago, albeit in a different context, this Court in a unanimous decision forcefully stated to courts below:

[T]his much is absolutely clear. Absent constitutional constraints of extremely compelling circumstances, the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"

*Vermont Yankee Nuclear Power v. Natural Resources Nuclear Power Corporation*, 415 U.S. 519, 543 (1978), quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965), quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Vermont Yankee* confirmed in forceful language that with regard to informal rule making (that conducted under 5 U.S.C. § 553), "courts are not generally free to impose [additional procedural rights] if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare." (*Vermont Yankee* at 524).

In the case before this Court, neither the Constitution, the Congress, nor decisions of the Court, require procedures beyond those employed by the SEC. The lower court's decision is, therefore, another unwarranted intrusion into the administrative process. A court's "perceived inadequacies of the procedure employed" (*Id.* at 541), whether in the area of informal rule making or as here with regard to agency issuance of investigatory subpoenas to third parties, provide no basis for finding that agency procedures — authorized by statute, constitutionally firm, and not precluded by decisions of this Court — are legally insufficient. The philosophy of *Vermont Yankee* — that "judicial intervention [will not be permitted to] run riot" in the administrative process — should be reasserted and reaffirmed. (*Id.* at 557).

No suggestion is made that "targets" of third-party subpoenas are without alternatives. The Congress can be

approached to include in the APA a "target"-notice requirement, as has been recommended by the American Bar Association. On the other hand, persons who believe that they might be potential "targets" can seek agreement, contractually or otherwise, with third-parties not to provide information requested by agency subpoenas, thus forcing an agency to invoke a court's process (and the *Powell* standards) if the information is to be obtained. What is clear is that no "target"-notice requirement currently exists which mandates in the case before the Court that the SEC must give notice to these "targets" of these third-party subpoenas.

The judgment of the court below should be reversed.

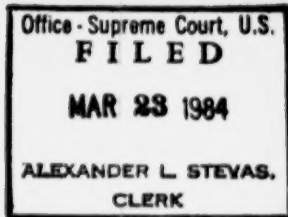
Respectfully submitted,

MICHAEL P. COX

300 Timberdell Road  
Norman, Oklahoma 73019

*Counsel, North American Securities  
Administrators Association, Inc.*

Dated: Norman, Oklahoma  
February 22, 1984



No. 83-751

IN THE

# Supreme Court of the United States

---

October Term, 1983

---

SECURITIES AND EXCHANGE COMMISSION, *et al.*,

*Petitioners,*

vs.

JERRY T. O'BRIEN, INC., *et al.*,

*Respondents.*

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit.

---

**AMICUS CURIAE BRIEF OF  
WEDBUSH, NOBLE, COOKE, INC.  
IN SUPPORT OF AFFIRMANCE**

---

RONALD L. OLSON  
C. DOUGLAS KRANWINKLE  
DENNIS E. KINNAIRD  
R. GREGORY MORGAN  
MUNGER, TOLLES & RICKERSHAUSER  
612 South Flower Street  
Los Angeles, California 90017  
(213) 683-9100

*Counsel for Amicus Curiae*

**QUESTION PRESENTED**

Whether the Court of Appeals exceeded its equitable powers to ensure that subpoena-enforcement proceedings will provide an adequate remedy at law for abuses proven there by ordering that investigation targets who allege abuse of process by the Securities and Exchange Commission in third-party subpoenas receive notice of subpoena issuances.

# TABLE OF CONTENTS

	Page
Question Presented .....	i
Interest of Amicus Curiae .....	1
Statement of the Case .....	2
A. Respondents' Complaints and the District Court Decisions .....	3
B. The Court of Appeals' Decision .....	5
Summary of Argument .....	6
Argument .....	9

## I.

THE COURT OF APPEALS CORRECTLY HELD THAT, UNLESS NOTICE IS GIVEN OF THE SUBPOENA ISSUANCE, THE SUBPOENA- ENFORCEMENT ACTION WILL NOT PRO- VIDE THE ADEQUATE REMEDY FOR THIRD- PARTY SUBPOENAS ISSUED IN BAD FAITH .....	9
A. The SEC's Issuance of Third-Party Subpoenas in Violation of <i>Powell</i> Violates the Target's Interest in the Good-Faith Conduct of the Investigation .....	9
B. As to Abusive Third-Party Subpoenas, the Subpoena-Enforcement Proceeding Is Not an Adequate Remedy for the Target's Interest, Absent Notice of Subpoena Issuance .....	14

## II.

BY ORDERING NOTICE IN THIS CASE, THE COURT OF APPEALS DID NOT ABUSE ITS EQUITABLE POWER TO FASHION A DECREE REQUIRED BY THE CIRCUMSTANCES .....	18
--	----

	Page
A. The Federal Courts Have the Equitable Power to Fashion Decrees Ensuring That Legal Remedies Are Adequate .....	19
B. The Court of Appeals Did Not Abuse Its Discretion in Ordering Notice of Third-Party Subpoenas Where Abuse of Third-Party Subpoenas Is Alleged .....	20
1. The Notice Order Contemplates a Procedure Already Devised and Familiar .....	21
2. An Order of Notice Is Not an Imposition of Procedures on the SEC .....	22
3. Notice Is Preferable to an Exclusionary Remedy .....	23
4. Notice Will Not Unduly Burden SEC Investigations .....	23
 III. 	
THIS COURT SHOULD NOT DECIDE IN THIS CASE WHETHER NOTICE OF THIRD-PARTY SUBPOENA ISSUANCE IS REQUIRED IN EVERY SEC INVESTIGATION .....	25
Conclusion .....	28

## TABLE OF AUTHORITIES

Cases	Page
Application of Cole, 342 F.2d 5 (CA2, cert. denied, 381 U.S. 950 (1965) .....	15, 18, 27
Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) .....	19
Boyce's Executors v. Grundy, 28 U.S. (3 Pet.) 210 (1830) .....	16
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) .....	24
Donaldson v. United States, 400 U.S. 517 (1971) .....	16, 17
Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943) .....	11
FCC v. Schrieber, 381 U.S. 279 (1965) .....	22
FTC v. American Tobacco Co., 264 U.S. 298 (1924) .....	11, 12
Gumbel v. Pitkin, 124 U.S. 131 (1888) .....	7, 20
Hannah v. Larche, 363 U.S. 420 (1960) .....	26
Hecht Co. v. Bowles, 321 U.S. 321 (1944) .....	2, 7, 19
Hjelle v. Brooks, 377 F. Supp. 430 (D. Ala. 1974) .....	16
Horowitz, In re, 482 F.2d 72 (CA2 1973) .....	26
In the Matter of Wedbush, Noble, Cooke, Inc. and Ken- neth Elliott, SEC File No. LA-402 (1983) .....	1, 2
Jerry T. O'Brien, Inc. v. SEC, 704 F.2d 1065 (CA 9 1983) .....	1, 2, 6, 9
Kirschenbaum v. Beerman, 376 F. Supp. 398 (W.D. Pa. 1974) .....	15, 27
Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960) .....	19



	Page
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) .....	7, 11, 12, 13, 14, 15, 16
O'Shea v. Littleton, 414 U.S. 488 (1974) .....	16
PepsiCo., Inc. v. SEC, 563 F. Supp. 828 (S.D.N.Y. 1983) .....	27
Porter v. Warner Holding Co., 328 U.S. 395 (1946) .....	19
Reisman v. Caplin, 375 U.S. 440 (1964) .....	7, 14, 15, 17, 18, 19
Rondeau v. Mosinee Paper Corporation, 422 U.S. 49 (1975) .....	19
Sampson v. Murray, 415 U.S. 61 (1974) .....	19
Scarafiotti v. Shea, 456 F.2d 1052 (CA10 1972) .....	15, 27
SEC v. Arthur Young & Co., 584 F.2d 1018 (CA DC 1978), cert. denied, 439 U.S. 1071 (1979) .....	11
SEC v. Blackfoot Bituminous, Inc., 622 F.2d 512 (CA 10 1980) .....	11
SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047 (CA2 1973), cert. denied, 415 U.S. 915 (1974) .....	11
SEC v. ESM Government Securities, Inc., 645 F.2d 310 (CA5 1981) .....	10, 13, 20
SEC v. Howatt, 525 F.2d 226 (CA1 1975) .....	11, 21
SEC v. Knopfler, 658 F.2d 25 (CA2 1981), cert. denied, 455 U.S. 908 (1982) .....	21
SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118 (CA3 1981) .....	10, 13, 21
Steadman v. SEC, 450 U.S. 91 (1981) .....	22
TVA v. Hill, 437 U.S. 153 (1978) .....	18
United States v. Blue, 384 U.S. 351 (1966) .....	17

	Page
United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926) .....	24
United States v. Church of Scientology, 520 F.2d 818 (CA9 1975) .....	21
United States v. Fensterwald, 553 F.2d 231 (CA9 1977) .....	21
United States v. Genser, 582 F.2d 292 (CA3 1978), cert. denied, 444 U.S. 928 (1979) .....	15, 27
United States v. Janis, 428 U.S. 433 (1976) .....	17, 23
United States v. Kis, 658 F.2d 526 (CA7 1981), cert. denied, 455 U.S. 1018 (1982) .....	21
United States v. LaSalle National Bank, 437 U.S. 298 (1978) .....	10
United States v. Morton Salt Co., 338 U.S. 632 (1950) .....	7, 11, 12, 13, 14
United States v. Powell, 379 U.S. 48 (1964) .....	passim
United States v. Schutterle, 586 F.2d 1201 (CA8 1978) .....	15, 27
USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94 (CA6 1982) .....	16
Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) .....	22
Wedbush, Noble, Cooke, Inc. v. SEC, No. CV-83-3961 CMB (Kx) (1983) .....	1
Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) .....	19, 20, 26

#### Constitution

United States Constitution, Fifth Amendment .....	26
---	----

	Page
<b>Statutes and Rules</b>	
12 U.S.C. §3401 et seq. ....	25
15 U.S.C. §77(a) et seq. ....	3
15 U.S.C. §77v(b) et seq. ....	11
15 U.S.C. §78(a) et seq. ....	1, 3
15 U.S.C. §78U(c) ....	11
17 CFR §200.66 ....	11
26 U.S.C. §7402(b) ....	11

#### Textbook

Development-Injunctions, 78 Harv. L. Rev. 994, 1022 (1965) .....	20
---	----

No. 83-751  
IN THE  
**Supreme Court of the United States**

---

October Term, 1983

---

SECURITIES AND EXCHANGE COMMISSION, *et al.*,  
*Petitioners,*

vs.

JERRY T. O'BRIEN, INC., *et al.*,  
*Respondents.*

---

**AMICUS CURIAE BRIEF OF  
WEDBUSH, NOBLE, COOKE, INC.**

---

**INTEREST OF AMICUS CURIAE**

Amicus Wedbush, Noble, Cooke, Inc. ("Wedbush") files this brief with the consent of Petitioners and Respondents. Wedbush is a broker-dealer registered with the Securities and Exchange Commission ("SEC") pursuant to the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.* Wedbush is currently a named subject of an SEC investigation. *In the Matter of Wedbush, Noble, Cooke, Inc. and Kenneth Elliott*, SEC File No. LA-402 (April 6, 1983). Upon a motion by Wedbush, the District Court for the Central District of California has preliminarily enjoined the SEC from issuing third-party subpoenas in its investigation without complying with *Jerry T. O'Brien, Inc. v. SEC*, 704 F.2d 1065 (CA9 1983), the decision before this Court for review. *Wedbush, Noble, Cooke, Inc. v. SEC*, No. CV-83-3961 CMB (Kx) (July 11, 1983), appeal pending, No. 83-6035

(C.D. Cal.), stay denied, 714 F.2d 923 (CA9 1983). This Court's decision and opinion will control the proceedings in Wedbush's case and the SEC's further conduct of its investigation. Accordingly, Wedbush has a direct interest in the Court's resolution of the question presented as well as a general interest as a member of the securities industry. Wedbush believes that the judgment in *O'Brien* must be affirmed.

#### STATEMENT OF THE CASE

This case is before the Court on facts deemed to be true. Respondents, targets of an SEC investigation, allege that the SEC in bad faith issued outstanding subpoenas to third parties. The District Court granted the SEC's motion to dismiss Respondents' complaints for injunction. The Court of Appeals reversed. It ordered notice of third-party subpoenas, to be given to investigation targets who allege SEC abuse in such subpoenas. This Court granted certiorari. Respondents' allegations of bad faith in third-party subpoenas therefore come to this Court as true for purposes of the Court's review.

This procedural posture explains the factual basis of the Court of Appeals' judgment. Read properly, the two opinions of the District Court and the opinion of the Court of Appeals make clear that the judgment below rested on an exercise of equitable power to fashion the decree required by the particular facts of the case. The Court of Appeals fashioned the notice decree in order to ensure that the target will have the opportunity to make his allegations of abuse at a subpoena-enforcement proceeding. The Court of Appeals relied on its equitable power in ordering notice, and exercised that power because of the allegations of abuse. Petitioners SEC *et al.* have failed to note that the allegations

prompting the notice order were deemed to be true and have failed to perceive the legal source of the order. As a result, Petitioners have misdirected their arguments in this Court.

#### **A. Respondents' Complaints and the District Court Decisions.**

Respondents are named subjects of an SEC formal order of investigation issued in September 1980.<sup>1</sup> The formal order authorized the investigation of suspected violations of the Securities Act of 1933, 15 U.S.C. §77a *et seq.* ("Securities Act"), and the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.* ("Exchange Act"). In September 1981, Respondents filed their complaints for injunctive and other relief in the District Court for the Eastern District of Washington. They alleged improper conduct by the SEC in three respects. One, they alleged that the SEC leaked to the news media the existence and suspicions of the non-public investigation. Two, an SEC staff member allegedly rummaged through files containing personal documents of Respondent Harrison in violation of his right of privacy. Three, Respondents alleged that the SEC issued to them subpoenas not meeting the good-faith requirements of *United States v. Powell*, 379 U.S. 48 (1964); that is, subpoenas without legitimate purpose, without a requisite relevancy, without procedural compliance, and without a need for the information demanded. Respondent O'Brien sought to restrain Respondent Magnuson from complying with a subpoena served upon him.<sup>2</sup> Respondent Magnuson cross-claimed to

---

<sup>1</sup>The formal order of investigation did not name Respondents Jerry T. O'Brien or Jerry T. O'Brien, Inc., but the SEC informed them that they were among the "others" whom the formal order stated were suspected of securities violations.

<sup>2</sup>As in the Brief for the Petitioners (Petr. Br. 3, n. 3), "O'Brien" includes Jerry T. O'Brien, Jerry T. O'Brien, Inc., Benjamin A. Harrison, and Pennaluna & Co., Inc. "Magnuson" means Harry F. Magnuson and H.F. Magnuson & Co.

enjoin the investigation. The SEC moved to dismiss all claims.

The District Court granted the SEC's motion to dismiss as to Respondents' claims for injunction. In an opinion and order filed on January 20, 1982, the court held that denial of subpoena enforcement is an adequate remedy at law against subpoenas issued in bad faith. Respondents could refuse compliance with the subpoenas and raise their claims at a subpoena-enforcement action if the SEC commenced one. (Pet. App. 17a-24a.) Accordingly, an injunction would not lie.<sup>3</sup> The court made no ruling on Respondents' non-injunctive claims.

---

<sup>3</sup>The District Court made the basis for its initial order clear in its subsequent order of March 25, 1982. After citing authority that a subpoena recipient is free to resist compliance and raise claims of bad faith at an enforcement proceeding, the court stated: "Denial of injunctive relief in the initial Order was predicated upon the foregoing considerations. The existence of an adequate remedy at law in the form of an enforcement hearing would clearly render extraordinary relief unavailable." (Pet. App. 10a.)

The District Court did not base its initial order on a rejection of Respondents' allegations of bad faith in the subpoenas directed to them. The court never made final findings of fact that the SEC had met the good-faith standard of *United States v. Powell*, 379 U.S. 48 (1964). Rather, as the court explained in Part III-A of its initial order, the court inquired only whether the SEC had made a prima facie case of good faith. In the court's view, "a prima facie case may be made out of little more than mere mechanical recitation of congressionally-authorized functions." (Pet. App. 19a.) Indeed, as to three parts of the *Powell* standard, the court looked to the SEC's formal order of investigation to determine from the face of that alone whether the standard had been met. On the fourth part, whether the SEC was demanding information already possessed, the court looked only to the face of the subpoenas. The court never made findings on Respondents' evidence in rebuttal of the prima facie showing, for the court then decided in Part IV of its order that Respondents could present their evidence only at the subpoena-enforcement action.

Thus, the court never made final findings of fact on *Powell*. It found prima facie compliance with *Powell*, with the exception that the SEC had missed one possibly required administrative step as to O'Brien. The court then dismissed the injunctive complaints because of the adequate remedy at law.



After the court's order, the SEC "waged an aggressive investigation, issuing numerous subpoenas in the Spokane area to various mining companies and brokers." (Pet. App. 10a.) Respondents returned to the District Court and sought injunctive relief against claimed SEC abuses in these third-party subpoenas. Respondents claimed that these subpoenas suffered the same defects as the subpoenas directed to them. Respondents further contended that if the court were again to commend them to the subpoena-enforcement proceeding, then they must receive notice of third-party subpoenas. Without notice, Respondents contended, they would not know if or when subpoena-enforcement proceedings would occur and could not urge denial of enforcement on the ground of abuse. In those circumstances, Respondents argued, denial of enforcement cannot be an adequate remedy negating an injunction.

The District Court denied injunctive relief in a memorandum and order filed on March 25, 1982. The court did not address the merits of Respondents' allegations of bad faith in the third-party subpoenas.<sup>4</sup> Rather, in the court's view, Respondents lacked standing and had an alternative adequate legal remedy besides the subpoena-enforcement proceeding: Respondents could move in any subsequent proceeding against them to suppress information obtained through abusive third-party subpoenas.

#### **B. The Court of Appeals' Decision.**

The Court of Appeals for the Ninth Circuit affirmed the dismissal of the injunctive complaint as to subpoenas directed to Respondents and reversed the denial of injunctive

---

<sup>4</sup>Respondents sought relief as to third-party subpoenas only after the January 20, 1982 opinion and order, as the SEC recognizes. (Petr. Br. 5.) The January 20, 1982 opinion and order, and its *prima facie* findings on *Powell*, concern only the subpoenas directed to Respondents.



relief as to third-party subpoenas. Only the reversal judgment is before this Court for review.

The Court of Appeals recited at the outset the procedural posture of the case as it then stood. The District Court had granted a motion to dismiss Respondents' injunctive claims on the ground that "agency-initiated subpoena enforcement proceedings afforded Respondents an adequate legal remedy." 704 F.2d 1065, at 1066. Accordingly, the Court of Appeals noted, "this appeal presents only questions of law." *Id.* Like the District Court, the Court of Appeals did not address the merits of Respondents' allegations as to third-party subpoenas.

The legal question before the court was whether, Respondents having alleged abuse in third-party subpoenas, a third-party subpoena-enforcement proceeding afforded an adequate opportunity to Respondents to present evidence of their allegations. The court held that such a proceeding is not adequate unless Respondents know of the third-party subpoenas. The court chose to exercise its power to assure that the proceeding would be an adequate remedy for the allegations, if proven there, by ordering notice of subpoena issuances. Because the District Court had not ordered notice, the Court of Appeals reversed that part of the judgment and remanded.

#### SUMMARY OF ARGUMENT

Exercising equitable power, the Court of Appeals in this case properly fashioned an order of notice to ensure that denial of subpoena enforcement is an adequate remedy for bad-faith SEC subpoenas.

#### I.

The issuance of third-party subpoenas in violation of the good-faith requirement of *United States v. Powell*, 379 U.S. 48 (1964), violates a protectable interest of the party under

investigation. *Powell* forbids the judicial enforcement of an SEC subpoena issued in bad faith. The prohibition protects the interests of parties affected by the subpoena to be free from agency compulsion beyond the agency's authority, purpose, or need. This Court has long recognized the interest in freedom from improper agency compulsion. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). The target of the SEC investigation is aggrieved by every violation of that interest, whether the SEC directs the bad-faith subpoenas to him or to third parties, for it is information about him and his affairs that the abusive investigation demands, exploits, and exposes.

The Court of Appeals correctly held that, unless the target knows of the subpoenas, denial of enforcement at a subpoena-enforcement action is inadequate to remedy violations of the target's interest committed through abusive third-party subpoenas. Since *Reisman v. Caplin*, 375 U.S. 440 (1964), the courts have recognized the target's practical problem: he cannot challenge third-party subpoenas of which he is unaware. In this case, where the target alleged abuses that if proven would warrant denial of subpoenas at enforcement proceedings, the Court of Appeals correctly held that notice is required to ensure that those proceedings will afford an adequate remedy.

## II.

The Court of Appeals had the equitable power to order notice in this case. The "essence of equity jurisdiction has been the power . . . to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321 (1944). Additionally, the court's inherent power to protect against abuse of its process supported the notice order. *United States v. Powell*, 379 U.S. 48 (1964); *Gumbel v. Pitkin*,

124 U.S. 131 (1888).

The Court of Appeals did not abuse its discretion in fashioning a notice order in this case. The notice order contemplates a procedure in which the target alleging abuse must make a *prima facie* showing in order to obtain notice. A notice order in such circumstances does not improperly impose procedures on the SEC. Notice is a preferable remedy to an exclusionary remedy, and notice will not unduly burden SEC investigations. If the target shows abuse, then a notice order is necessary to ensure a remedy and to protect court process.

### III.

This Court should not decide in this case the question whether notice to targets of subpoena issuances is required in every SEC investigation. Because the facts of the case do not raise that question, any such decision would be dictum. As no conflict exists among the courts of appeals on that question, no resolution by this Court is necessary. Moreover, the factual record in this case does not sufficiently inform the Court for an analysis of this important question. Therefore, although believing that notice is required in every investigation, Amicus Wedbush suggests that the Court not address or decide the question in this case. Rather, the Court can and should hold that the Court of Appeals correctly exercised its equitable powers in this case to order notice so that Respondents can present their evidence of abuse at a subpoena-enforcement proceeding.

## ARGUMENT

### I.

**THE COURT OF APPEALS CORRECTLY HELD THAT, UNLESS NOTICE IS GIVEN OF THE SUBPOENA ISSUANCE, THE SUBPOENA-ENFORCEMENT ACTION WILL NOT PROVIDE THE ADEQUATE REMEDY FOR THIRD-PARTY SUBPOENAS ISSUED IN BAD FAITH.**

The Court of Appeals agreed with Respondents that “subpoena enforcement proceedings do not afford targets an adequate legal remedy unless the agency notifies them of the identities of the subpoenaed third parties.” 704 F.2d, at 1067. The Court of Appeals termed the target’s interest a “right to be investigated consistently with the *Powell* standards.” 704 F.2d, at 1068, 1069. This interest to be investigated only in good faith is the interest that requires protection and remedy if injured. The Court of Appeals correctly recognized this interest of targets in third-party subpoenas. The court correctly held that violations of the interest will not be remedied through subpoena-enforcement proceedings if the target received no notice of the third-party subpoenas.

**A. The SEC’s Issuance of Third-Party Subpoenas in Violation of *Powell* Violates the Target’s Interest in the Good-Faith Conduct of the Investigation.**

The subject of an SEC investigation has a protectable interest in seeing that subpoenas issued in that investigation satisfy *United States v. Powell*, 379 U.S. 48 (1964). A subpoena that fails to satisfy *Powell* aggrieves that interest, whether the SEC directs the subpoena to the subject or a third party. This Court has long recognized that interest of

the subject, or "target,"<sup>5</sup> and has protected it.

*Powell* demands that agencies issue their subpoenas in good faith. 379 U.S., at 58. While *Powell's* statement of the elements of agency good faith is not exhaustive, *United States v. LaSalle National Bank*, 437 U.S. 298, 317, n. 19 (1978); *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 314 (CA5 1981); *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 124-125 (CA3 1981) (en banc), the *Powell* statement has become the accepted general standard. Thus, to obtain enforcement of a subpoena, the agency "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [agency's] possession, and that the administrative steps required . . . have been followed." 379 U.S., at 57-58. The courts of appeals have applied this standard to SEC subpoenas.<sup>6</sup> E.g., *SEC v. ESM Government Securities, Inc.*, *supra*, 645 F.2d, at 313, n. 3; *SEC v. Wheeling-Pittsburgh Steel Corp.*, *supra*, 648 F.2d, at 123,

---

<sup>5</sup>"Target" is not a precisely defined term in discussions of investigations and subpoenas, but its imprecision should not pose such grave uncertainties as the SEC suggests. (Petr. Br. 31-33.) Generally, the "target" of an investigation is the party whom the SEC suspects of securities violations. Presumably that party is often the named subject of the formal order of investigation. To be sure, when the SEC commences an investigation because of suspicious transactions — extraordinary trading just before a tender offer is the SEC's example (Petr. Br. 32, n. 43) — there may be many potential targets. But in fulfilling its enforcement duty, the SEC will inevitably narrow its attention to specific parties. The Court need not define when a party becomes a target. It is enough that the SEC clearly suspected Respondents in this case of securities violations, and that any party who seeks notice of subpoenas in a future case will have to show the kind of interest, described in Part I-A of this brief, that SEC bad faith in subpoenas would violate.

<sup>6</sup>The SEC does not dispute that the *Powell* standard has been commonly applied to SEC subpoenas. See Petr. Br. 26, n. 31. In *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 123, n. 5 (CA3 1981) (en banc), the SEC assumed that *Powell* applied.

n. 5; *SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 515 (CA10), *cert. denied*, 449 U.S. 955 (1980); *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024, n. 39 (CA10 1978), *cert. denied*, 439 U.S. 1071 (1979); *SEC v. Howatt*, 525 F.2d 226, 229 (CA1 1975); *SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (CA2 1973), *cert. denied*, 415 U.S. 915 (1974).

The *Powell* standard of good faith is the minimum conduct required of the SEC in its exercise of subpoena power. The standard represents the balance the Court has struck between the competing interests at stake in the enforcement of administrative subpoenas.<sup>7</sup> In the interests of effective enforcement of Congress' policies, the Court has preserved Congress' power to authorize agency investigations of the broadest latitude consistent with constitutional protections. But mindful that investigation is intrusion, and a burden on the affairs and resources of private parties, the Court prohibits judicial enforcement of agency subpoenas that seek to compel information outside the agency's authority, information too indefinitely defined, or information not reasonably relevant to the agency's inquiry.<sup>8</sup> *United States v. Morton Salt Co.*, 338 U.S. 632, 652-653 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 213 (1946); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943); *FTC v. American Tobacco Co.*, 264 U.S. 298,

---

<sup>7</sup>Congress too has recognized the tension between agencies' necessarily wide latitude to investigate and private interests, those of the subject of investigation and other affected parties. Congress has therefore routinely granted power to the agencies to issue subpoenas, but reserved to courts the power to enforce. *E.g.*, Section 22(b) of the Securities Act of 1933, 15 U.S.C. §77v(b); Section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(c); Section 7402(b) of the Internal Revenue Code, 26 U.S.C. §7402(b).

<sup>8</sup>The SEC's Canons of Ethics, 17 C.F.R. §200.66, forewarn that "the power to investigate carries with it the power to defame and destroy."



306-307 (1924). These prohibitions protect the "interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest." *Oklahoma Press Publishing Co. v. Walling*, *supra*, 327 U.S., at 213. The good-faith requirement protects the same interests by requiring a legitimate purpose to the investigation, a relevancy in the information sought, an adherence to the agency's own procedures, a need behind the inquiry, and a shunning of any action that would abuse Congress' entrustment of subpoena power to the agencies.

A subpoena issued in violation of *Powell*, in bad faith, perforce violates the private interests of those affected by it. The affected parties are burdened with illegitimate agency demands,<sup>9</sup> and the courts refuse to enforce such subpoenas. *Powell* stated, "It is the court's process which is invoked to enforce the administrative summons, and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose . . . or for any other purpose reflecting on the good faith of the particular investigation." 379 U.S., at 58.

The target of the investigation feels personally every violation of this interest to be free from subpoenas in bad

---

<sup>9</sup>The *Powell* standard echoes the Fourth Amendment standard articulated for agency subpoenas by *Oklahoma Press Publishing*, *supra*, and *Morton Salt*, *supra*. The differences in the *Powell* standard are attributable to the particular Internal Revenue Code provision at issue in *Powell*. That provision dictates certain administrative steps and prohibits "unnecessary" investigations. As discussed in Part III of the argument, there is no need for the Court to consider whether or to what extent the *Powell* standard reflects constitutional concerns, and the Court should not consider those questions. It is sufficient for the decision of this case that the *Powell* standard has become an accepted protection recognized by federal case law against agency subpoenas in bad faith.

faith, whether the subpoena is directed to him or a third party. It is information about the target that an overbroad subpoena compels. The target's affairs are exposed by an unauthorized governmental inquiry, with all the distraction of time and energy, the inevitable publicity, and the cast of suspicion and doubt among the target's customers, colleagues, and personnel. The agency may use against the target the information obtained in disregard of the checks of administrative procedures. The target suffers these abuses from any bad-faith subpoena in the investigation of him. Whether the bad-faith subpoena is directed to him or to a third party, the violation of *Powell* violates the target's interest in freedom from "officious intermeddling."

The target's interest suffers whether the SEC violates the particular elements of good faith described in *Powell* or demonstrates bad faith in some novel manner. The Court explained in *United States v. LaSalle National Bank, supra*, 437 U.S., at 317, n.19, "The *Powell* elements were not intended as an exclusive statement about the meaning of good faith. . . . The dispositive question in each case, then, is whether the [agency] is pursuing the authorized purposes in good faith." The courts of appeals have properly rejected an SEC contention that this Court "has foreclosed incremental development of the law by the courts when [they] are faced with allegations of egregious abuses." *SEC v. Wheeling-Pittsburgh Steel Corp., supra*, 648 F.2d, at 123; *SEC v. ESM Government Securities, Inc., supra*, 645 F.2d, at 314-315 (holding that fraud, deceit, or trickery are grounds for denial of enforcement). When the SEC uses the subpoena power bestowed by Congress in a manner or for a purpose that abuses Congress' entrustment or the courts' power of enforcement, the SEC acts in bad faith and violates the target's interest.



The Court of Appeals in this case called the target's interest a right to be investigated consistently with the *Powell* standard. The Court of Appeals' description may be new, but the interest described is not. It is the interest that prompted the *Powell* standard, and the same kind of interest that this Court protected even before *Powell* by requiring authorized purpose and reasonable relevancy in cases like *Oklahoma Press Publishing, supra*, and *Morton Salt, supra*. Having recognized the interest, the Court of Appeals inquired whether the subpoena-enforcement proceeding adequately protects the interest when it is alleged to be violated by third-party subpoenas.

**B. As to Abusive Third-Party Subpoenas, the Subpoena-Enforcement Proceeding Is Not an Adequate Remedy for the Target's Interest, Absent Notice of Subpoena Issuance.**

This Court held in *Reisman v. Caplin*, 375 U.S. 440 (1964), that denial of enforcement at a subpoena-enforcement proceeding is an adequate remedy at law to subpoena recipients and other affected parties raising challenges to a subpoena. The lower federal courts ever since have recognized the question that *Reisman's* holding necessarily raises: if the "other affected parties" have their remedy only at an enforcement proceeding, must not the affected parties receive notice of a subpoena so that they may raise their challenges? The Court of Appeals in this case struggled with the same question and correctly decided that notice must be given for the enforcement proceeding to afford its remedy to Respondents.

*Reisman* arose from an IRS subpoena issued to two taxpayers' accountants. The taxpayers' attorneys sued to enjoin voluntary compliance or enforcement on the ground that compliance would work an unlawful appropriation of at-

torney work product. The Court dismissed "for want of equity" because the taxpayers had an adequate remedy at law in the subpoena-enforcement proceeding provided by statute. 375 U.S., at 443. At that proceeding, the Court stated, "the witness may challenge the summons on any appropriate ground. . . . In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene." *Id.*, at 449. If the subpoena recipient were to indicate a willingness to comply, "either the taxpayer or any affected party might restrain compliance" to bring about the enforcement proceeding where he will make his challenge. *Id.*, at 450.

The question of notice arose promptly. Within a year of *Reisman* the Court of Appeals for the Second Circuit faced a target's claim for notice in *Application of Cole*, 342 F.2d 5 (CA2), *cert. denied*, 381 U.S. 950 (1965). Other courts subsequently recognized the question inherent in *Reisman*'s holding. *United States v. Schutterle*, 586 F.2d 1201, 1204 (CA8 1978); *United States v. Genser*, 582 F.2d 292, 300-301 (CA3 1978), *cert. denied*, 444 U.S. 928 (1979); *Scarfioiti v. Shea*, 456 F.2d 1052, 1053 (CA10 1972); *Kirschenbaum v. Beerman*, 376 F.Supp. 398, 399-400 (W.D.Pa. 1974). Indeed, in *United States v. Genser* the court incorporated the problem of notice into its statement of the law of subpoena challenges: the target "may attempt to restrain voluntary compliance by the third party, assuming that he is aware of the issuance of the summons prior to compliance, and he may challenge the validity of the summons by attempting to intervene in the ensuing enforcement proceedings." 582 F.2d, at 300-301 (footnotes omitted).

Because of the nature of Respondents' interests at stake in this case, the Court of Appeals fashioned a solution to the notice problem. The court had before it Respondents'

allegations that third-party subpoenas issued in bad faith were violating Respondents' interests as targets. The court recognized that, without notice, the target's opportunity to prove his claims and get relief depends on mere fortuity. The target may or may not learn of the subpoena. The third party himself might resist the subpoena, but usually will not. The third party might resist a burdensome subpoena, but probably will lack the motivation, resources, or nerve to resist on any other ground. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 219 (1946) (Murphy, J., dissenting) ("Many persons have yielded solely because of the air of authority with which the demand is made . . ."). The third party in most events may not even realize the SEC's bad faith. The third party may not suffer from it; the target will.

Thus, unless notice is given to the target, the subpoena-enforcement proceeding will not afford the target the remedy for *Powell* violations that he could prove there. Without notice, the target may never receive the opportunity to present his proof. Denial of enforcement is therefore not "adequate," as the courts in equity use the word, without notice. To be adequate, denial of enforcement "must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity." *Boyce's Executors v. Grundy*, 28 U.S. (3 Pet.) 210, 215 (1830); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 99 (CA6 1982); *Hjelle v. Brooks*, 377 F.Supp. 430, 437 (D.Ala. 1974). See also *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974).

It is not a rebuttal to the Court of Appeals' decision to recite, as the SEC's brief does (Petr. Br. 10, 25), that intervention at the enforcement proceeding is permissive only. See *Donaldson v. United States*, 400 U.S. 517 (1971). The target alleging *Powell* violations requires notice in order

to seek to intervene. *Donaldson* states that a target's intervention "in an enforcement proceeding might well be allowed when the circumstances are proper. . . . The usual process of balancing opposing equities is called for." 400 U.S., at 530. For example, in *Donaldson* itself the taxpayer-target asserted "nothing more than a desire . . . to counter and overcome [the subpoena recipients'] willingness, under summons, to comply and to produce records." *Id.*, at 531. The Court held that that interest "is not enough and is not of sufficient magnitude" to allow intervention. *Id.* The Court contrasted that interest of the taxpayer to "a protectable interest, as, for example, . . . to the extent he may claim abuse of process."<sup>10</sup> *Id.* Targets making that claim may have a right to intervene, depending on all the circumstances and the balance of equities. But certainly nothing in *Donaldson* forecloses a target claiming *Powell* violations in third-party subpoenas from gaining intervention. Only if it were clear that targets making such claims could never intervene would the permissive nature of intervention at the subpoena-enforcement proceeding negate the need for notice to the

---

<sup>10</sup>The Court stated further that a taxpayer could claim abuse of process in a subsequent trial, citing *United States v. Blue*, 384 U.S. 251 (1966). The Court certainly did not imply that in all cases abuse of process could be raised only at a subsequent trial. Rather, the Court meant that abuse could be raised at a criminal trial, such as in *United States v. Blue*, *supra*. The Court's statement was doubtless prompted by the taxpayer's claim in *Donaldson* that the IRS had used civil subpoenas to gather evidence for a criminal prosecution. In contrast, a claim of abuse of process would not avail the injured target at a subsequent civil proceeding, for the Court has never applied an exclusionary rule to civil trials. *United States v. Janis*, 428 U.S. 433 (1976). Thus, the Court's statement in *Donaldson* that a claim of abuse of process is "a protectable interest" would support a target seeking intervention to prove *Powell* violations in third-party subpoenas.

targets. See *e.g.*, *Application of Cole*, *supra*, 342 F.2d, at 8.<sup>11</sup>

In sum, the Court of Appeals correctly recognized the target's interest in freedom from SEC subpoenas in bad faith, whether issued to him or a third-party. Bound by *Reisman* to direct the complaining target to a subpoena-enforcement proceeding, but aware that the target's interest will depend on the mere chance of a third-party's resistance, the Court of Appeals ordered notice to the target of subpoena issuances. The court thereby ensured that denial of enforcement will be available to the target who proves bad faith.

## II.

**BY ORDERING NOTICE IN THIS CASE, THE COURT OF APPEALS DID NOT ABUSE ITS EQUITABLE POWER TO FASHION A DECREE REQUIRED BY THE CIRCUMSTANCES.**

The federal courts have a broad power in equity to fashion the decree required by a particular case. Such power includes the discretion to fashion a decree that ensures the availability of an otherwise uncertain legal remedy. An exercise of such power is reversible only for abuse of discretion.

The Court of Appeals in this case did not abuse its discretion in assuring the adequacy of denial of enforcement at a subpoena-enforcement proceeding as a remedy to targets for third-party subpoenas issued in bad faith. The court's order contemplates only a familiar and already established procedure. The order will not unduly burden SEC investigations and is not an improper imposition of procedures. Instead, the order forestalls the need for an exclusionary remedy at any subsequent proceedings.

---

<sup>11</sup>The Court need not decide that all allegations of *Powell* violations will warrant intervention at the subpoena-enforcement proceeding. The district court considering a target's request to intervene can decide upon the particular facts of each case. A notice order simply assures that the target will receive an adequate opportunity to make his request.

**A. The Federal Courts Have the Equitable Power to Fashion Decrees Ensuring That Legal Remedies Are Adequate.**

Respondents in this case invoked the equity jurisdiction of the federal courts in seeking to enjoin SEC violations of *Powell*. The hallmark of equity jurisdiction is flexibility. The Court stated in *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944):

“The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.”

See also, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975). The court below, however, felt constrained not to grant an injunction, as “[t]he basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.” *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959); *Sampson v. Murray*, 415 U.S. 61, 88 (1974). *Reisman*, of course, held that denial of enforcement at the subpoena-enforcement proceeding is an adequate legal remedy negating an injunction.

The court’s decision not to grant an injunction did not strip it of its equity powers. The court retained its equitable power to accord complete relief as required by the circumstances. See *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960). The circumstances of this case called for an order that corrected the practical problem of notice while respecting *Reisman* and the SEC’s subpoena



power. Equity traditionally has enjoyed the power to correct mechanical inadequacies in the judicial system. *See* Development-Injunctions, 78 Harv. L. Rev. 994, 1022 (1965). The Court of Appeals exercised that power in this case by ordering notice to ensure the targets of their opportunity to challenge third-party subpoenas at subpoena-enforcement proceedings. Indeed, the court's duty to direct Respondents to their legal remedy implied a duty, and therefore a power, to assure that the legal remedy is adequate in practice as well as theory. Thus, the court had power, as a matter of equity, to mould the notice order.

In addition, the court's inherent power to protect its process empowered the court to ensure that denial of enforcement would in fact be an adequate remedy. According to *Gumbel v. Pitkin*, 124 U.S. 131, 145-146 (1888), "the equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression, and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise." *Powell* invokes the same protective power in admonishing that a "court may not permit its process to be abused." 379 U.S., at 58. *See also SEC v. ESM Government Securities, Inc.*, *supra*, 645 F.2d, at 317.

Thus, the Court of Appeals had all the power necessary to order notice. As an exercise of equity and in protection of its own process, the court fashioned a decree to ensure that the subpoena-enforcement proceeding would afford an adequate remedy.

**B. The Court of Appeals Did Not Abuse Its Discretion in Ordering Notice of Third-Party Subpoenas Where Abuse of Third-Party Subpoenas Is Alleged.**

The Court of Appeals' exercise of equity power is reversible only for abuse of discretion. *Weinberger v. Romero-Barcelo*, *supra*, 456 U.S., at 320. The court did not abuse its discretion in this case.

**1. The Notice Order Contemplates a Procedure Already Devised and Familiar.**

The District Court erred in shying from the request for notice because it is a "novel remedy." (Pet. App. 12a.) Respondents are not the first to allege abuse by the SEC, and their request for notice invokes the same procedure and allocation of proof that courts of appeals have devised for handling targets' requests for evidentiary hearings or for discovery against agencies issuing subpoenas. Targets who allege bad faith or other abuse in an agency investigation may request a hearing or discovery against the agency. When the target presents some evidence of the claimed abuse, the courts of appeals have said that discovery or a hearing is appropriate. *SEC v. Knopfler*, 658 F.2d 25, 26 (CA2 1981) (per curiam), cert. denied, 455 U.S. 908 (1982); *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 128 (CA3 1981) (en banc); *United States v. Kis*, 658 F.2d 526 (CA7 1981), cert. denied, 455 U.S. 1018 (1982); *United States v. Fensterwald*, 553 F.2d 231, 232-233 (CAD9 1977), (per curiam); *United States v. Church of Scientology*, 520 F.2d 818, 823-825 (CA9 1975); *SEC v. Howatt*, 525 F.2d 226, 229 (CA1 1975). The courts have differed in their articulation of the quality and quantity of the evidence that warrants discovery, but have agreed that the target bears the initial burden to show some evidence of improper agency conduct.

A request for notice requires only this established procedure. The target bears the initial burden to present some evidence of bad faith in third-party subpoenas. The target could make this showing at an injunction hearing or at an enforcement proceeding on a subpoena about which the target knows. The target's evidence must suggest claims that will warrant denial of a subpoena if proven at an enforcement proceeding on that subpoena. If the target makes



this prima facie showing, the court should order notice of third-party subpoenas so that the target can pursue his opportunity to present his evidence and obtain his legal remedy at the enforcement proceeding.

This procedure presents no new or novel problems to the courts or the SEC. The Court of Appeals in this case cannot be said to have abused its discretion by making an order that contemplates this familiar procedure.

**2. An Order of Notice Is Not an Imposition of Procedures on the SEC.**

The SEC erroneously suggests that the Court of Appeals acted beyond its power by imposing a new administrative procedure on the agency. (Petr. Br. 23, n. 27, 25-26; Pet. for Cert. 9-10, n. 25.) The court did not violate the well-established rule that agencies are free to determine their own procedures. *Steadman v. SEC*, 450 U.S. 91, 104 (1981); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978); *FCC v. Schrieber*, 381 U.S. 279, 290-291 (1965). None of these cases concern the court's equitable power to fashion a decree in appropriate circumstances to ensure that a legal remedy is adequate. The SEC's freedom under these cases to designate its own administrative procedures is not a freedom to investigate in violation of *Powell*, nor is it a freedom from orders the court makes to protect against abuse of process. The SEC cannot exploit, in the name of administrative integrity, the target's handicap in not knowing when or where he may find an enforcement proceeding to put on his proof of administrative abuse. Concern for the SEC's prerogative over its procedures cannot be a basis for determining that the court abused its discretion in ordering notice.

**3. Notice Is Preferable to an Exclusionary Remedy.**

The District Court refused to order notice because, in part, it concluded that Respondents had an alternative adequate remedy in a motion to suppress evidence obtained through bad faith. The Court of Appeals choose instead to prevent the abuse. That choice did not exceed the court's discretion.

The societal costs of an exclusionary rule and the limits of its deterrent force are familiar to the Court. Because of those costs and limitations, the Court has not applied an exclusionary rule to suppress evidence in civil proceedings. *United States v. Janis*, 428 U.S. 433, 447 (1976). The Court of Appeals therefore avoided the troublesome exclusionary rule altogether, in favor of the notice order that also allows a surer remedy for bad-faith subpoenas. The court did not abuse its discretion in fashioning the preferable remedy.

**4. Notice Will Not Unduly Burden SEC Investigations.**

For several reasons, the SEC's claims that notice will corrupt and delay investigation are extravagant. A notice order will not unduly burden SEC investigations.

First, the SEC's third-party subpoenas need not be subject to a notice order in every investigation. Notice is appropriate, however, upon a prima facie showing by the target of SEC bad faith. Thus, the SEC itself will hold the greatest control over the possibility of a notice order: none need necessarily be made so long as the SEC's subpoenas satisfy *Powell*.

Second, notice will not cause undue delay. Presumably each SEC subpoena bears a return date by which the recipient is to comply if he intends to do so. Before that date, the SEC has no ground to complain of delay. A notice order need not extend the return date. With or without notice given, the SEC can seek enforcement as promptly as it

chooses after the return date. Notice therefore injects no more delay into an investigation through subpoena than the mechanics of the subpoena itself require. The SEC's bemoaning of delay strikes a particularly false note in this case, where the SEC waited more than a year after initiating the investigation before attempting to enforce subpoenas. (Resps. Op. to Cert. 5, n.3)

Third, notice will not result in the undermining of witnesses or evidence feared by the SEC. The court that orders notice in its equity power has the full ability to protect against abuses by the target. The court can enter such protective or limiting orders as the circumstances dictate. The court should not indulge, however, in the presumptions of lawlessness that the SEC allows itself. (Petr. Br. 27-29; Pet. for Cert. 12-13.) There is no basis for concluding in the abstract that targets will obstruct investigations. As the SEC enjoys a presumption of lawful activity, see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926), so the investigation target should be presumed responsible unless shown otherwise. A court faced with specific SEC allegations of misconduct in connection with a notice order may tailor such relief as is appropriate.

Fourth, a notice order will not engender needless litigation. Subpoena-enforcement proceedings that may not otherwise have occurred will not be needless if they are required to protect the target's interest. On the other hand, targets intent on obstruction are likely to obstruct with or without notice. The SEC has had to obtain relief in the past from obstruction, and will again in the future. But notice does not present so great a risk of obstruction as to outweigh alone the need to assure protection of the target's right.

In summary, the federal courts have the power to order notice of third-party subpoena issuances to ensure that targets alleging SEC bad faith have an adequate remedy at a subpoena-enforcement proceeding for abuses proven there. The Court of Appeals did not abuse its discretion in ordering notice in this case.

### III.

#### **THIS COURT SHOULD NOT DECIDE IN THIS CASE WHETHER NOTICE OF THIRD-PARTY SUBPOENA ISSUANCE IS REQUIRED IN EVERY SEC INVESTIGATION.**

The decision below raises the question whether a district court may order notice of subpoenas when an investigation target alleges SEC bad faith in third-party subpoenas. For the reasons stated above, a court may make such an order in its equitable discretion if the target produces prima facie evidence of bad faith. This case does not raise the question whether notice is appropriate in every SEC investigation. Amicus Wedbush believes that notice is required in every investigation, but respectfully suggests that the Court not reach that question. Resolution of that question is unnecessary to the decision of this case, and is not required to resolve any conflict of opinion among the courts of appeals. The question warrants further deliberation among the lower courts on fuller factual records.

If the Court were to address the question of notice of every investigation, the Court should hold that notice is required in every investigation to enable the target to assert his interest in the SEC's conformance with *Powell*. As explained above, third-party subpoena recipients lack the incentive, knowledge, or nerve to question SEC subpoenas. The target alone has sufficient interest to assert the *Powell* standard. Without notice, however, even the target cannot adequately enforce his interest, and the SEC is routinely free from any burden of proving compliance with *Powell*.

The SEC can compel sworn testimony and document production through third-party subpoenas without any judicial check. Congress, however, plainly envisioned that the courts restrain agency subpoena abuse, and for that reason made agency subpoenas enforceable only by the courts. Notice to targets of subpoena issuances make effective the judicial check that Congress envisioned and the good-faith standard that *Powell* required.<sup>12</sup>

For three reasons, however, this Court should not decide the question whether notice is required in every SEC investigation. First, the Court's decision on that question could

---

<sup>12</sup>The SEC argues at length that neither the Constitution or the securities laws support the notice order decreed by the Court of Appeals. These questions are considerably harder than the SEC suggests. First, it should not be conceded, whether or not Respondents have, that the Due Process Clause of the Fifth Amendment does not support the notice order to protect the target's *Powell* interest. That position is open after *Hannah v. Larche*, 363 U.S. 420 (1960). Those who sought information in *Hannah* about the Civil Rights Commission investigation asserted no established, protected legal right. *Id.*, at 442-443. Due process therefore did not require the rights of identification and cross-examination requested. Investigation targets assert the established right to be free from agency bad faith. The protections to be accorded that right depend on a different balancing of interests than was appropriate to *Hannah*.

Second, there is a question whether the *Powell* standard is strictly federal case law or rests to some degree on the Fourth Amendment protection against unreasonable search and seizure. The *Powell* standard and the Fourth Amendment requirements for subpoenas "overlap," as the SEC notes. (Petr. Br. 26, n. 31). See also *In re Horowitz*, 482 F.2d 72, 75-79 (CA2 1973). To the extent that the target's interests protected by *Powell* are constitutionally based, they may warrant greater protection than notice of subpoena issuances.

The SEC's brief also discusses the Right to Financial Privacy Act of 1978, 12 U.S.C. §3401, *et seq.* That Act does not influence the question whether the courts in their equitable powers may order notice to ensure the target a remedy for *Powell* violations. Nothing in the legislative history of the Act suggests that Congress intended to restrict or confine the federal court's equitable powers. Only the clearest statement of such an intention would justify such an interpretation of the Act. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). The SEC does not suggest that Congress had any such intent in the Act. Accordingly, the Act is inapposite except as it suggests that Congress deemed notice a workable device to protect interests put at jeopardy by agency subpoenas.

only be dictum because a resolution of the question is unnecessary to the disposition of this case. The record shows allegations, deemed to be true, of SEC abuses in third-party subpoenas. The Court of Appeals ordered notice to ensure Respondents an opportunity to present proof of their allegations at a subpoena-enforcement proceeding. The only question raised by this record is whether the Court of Appeals abused its equitable discretion in ordering notice under those circumstances.

Second, no conflict exists among the courts of appeals whether targets should receive notice in every SEC investigation in order to assert their interests in compliance with *Powell*. In none of the prior cases that recognized the practical problem of a target's lack of notice did the court address its equitable power to order notice for the preservation of the target's ability to assert the *Powell* interest. *Application of Cole*, *supra*, 342 F.2d 5; *United States v. Schutterle*, *supra*, 586 F.2d 1201; *United States v. Genser*, *supra*, 582 F.2d 292; *Scarafiotti v. Shea*, *supra*, 456 F.2d 1052; *Kirchenbaum v. Beerman*, *supra*, 376 F. Supp. 398. Only the recent district court decision in *PepsiCo., Inc. v. SEC*, 563 F. Supp. 828 (S.D.N.Y. 1983), considers the question of notice in every investigation.<sup>13</sup> This Court has no need to address that question unless and until the courts of appeals have addressed it and differed in their opinions.

Third, the broader question requires a fuller factual record and deserves more deliberate lower-court consideration than this case affords. The Court's decision may affect subpoenas

---

<sup>13</sup>*PepsiCo.* does not suggest that the Court of Appeals in the case before the Court exceeded its equitable powers. In denying notice, the court in *PepsiCo.* stated, "PepsiCo. has not identified a single subpoena issued by the SEC that even arguably violates the principles in *Powell*, or that seeks information on a subject or from a source that could possibly lead to the revelation of privileged material." 563 F. Supp., at 830.



its proof of showing legitimacy, the statutory subpoena-enforcement action constitutes an adequate remedy at law, preventing SEC abuse of investigatory authority.<sup>12/</sup>

However, if the target is not aware of the issuance of third-party subpoenas, then the subpoena-enforcement action is not an adequate remedy at law. The Congressionally-mandated forum for scrutinizing the SEC's exercise of investigatory authority is effectively bypassed. Through lack of motive or ignorance of

---

<sup>12/</sup> As to each subpoena, the SEC must meet Powell requirements. An agency subpoena to one party may meet the test; but a subpoena to a second party may fail. See U.S. v. Theodore, 479 F.2d 749 (4th Cir. 1973), in which the court found that an IRS summons to a third-party accountant of the target taxpayer was "too broad and too vague to be enforced". See also U.S. v. Harrington, 388 F.2d 520 (2d Cir. 1968), in which the court ordered enforcement of an IRS summons to a third party but only after finding the IRS summons was relevant and not over broad.

their rights, most non-target third parties will not resist compliance with agency subpoenas.<sup>11/</sup> As this Court has noted:

"True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though

---

<sup>11/</sup> A subpoena is issued because compulsion is necessary to coerce information a person will not voluntarily give. A target has an obvious interest in whether or not the agency investigation is lawful. If the agency has no legitimate purpose for investigating the target, or seeks information not relevant to that purpose, or otherwise acts unlawfully, then the target should not be subjected to the investigation and its adverse effects. However, a non-target third party does not share these same interests. A third party suffers only the inconvenience of producing documents or giving testimony as requested and no other adverse effects. Common sense tells us that the third party does not have the conviction of principle or other motivation required to undertake the costs of litigation inherent in litigating with the government. Additionally, because of the coercive form of the agency subpoena, a third party may not know that the agency subpoena is not enforceable unless first ordered by a court.



"improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command, or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation." Cudahy Packing Co. v. Holland, 315 U.S. 357, 363-64 (1942), quoted in U.S. v. Menker, 350 U.S. 179, 187 (1956).

The government is frank to admit that it seeks to avoid subpoena-enforcement actions required by Section 21(c) of the Exchange Act.<sup>11/</sup> The government argues that notice will result in an increase in the number of subpoena-enforcement actions and that this will turn SEC investigations into trial-like proceedings. As the Court of Appeals noted, subpoena-enforcement actions are summary proceedings and have priority on court

---

<sup>11/</sup> The government argues that a notice requirement constitutes the court's imposition of procedural rules on the executive branch in violation of FCC v. Schreiber, 381 U.S. 279 (1965). However, as stated in SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976):

calendars. The SEC's burden of showing the Powell requirements is not difficult, and in most cases may be done by affidavit. Once the showing is made, the subpoena is enforced unless a party affirmatively shows the SEC's conduct is unreasonable. Such "burden is not easily met". SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1056 (2d Cir. 1973).

The government raises a "parade of horrors" listing the ways targets with

---

11/ (Continued)

"Nor do we find anything to the contrary in FCC v. Schreiber . . . , heavily relied on by the Commission. Although the Court there counseled judicial restraint in interfering with the broad procedural powers delegated by Congress to the federal agencies, it nevertheless reaffirmed the responsibility of the courts to insure that administrative action is consistent with governing statutes and constitutional requirements." 533 F.2d at 11 (citations omitted). See also SEC v. Higashi, 359 F.2d 550 (9th Cir. 1966).

notice could obstruct agency investigations; however, "such speculation is insufficient". SEC v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976). See also Sells Engineering, supra. By requiring notice, the Court of Appeals has done no more than ensure the effectiveness of Sections 19(b), 20(a), and 22(b) of the Securities Act and Section 21 of the Exchange Act. If notice is not given to targets, then the SEC effectively avoids the Congressionally-mandated checks and balances for prevention of agency abuse.<sup>13/</sup>

---

<sup>13/</sup> The government argues that notice is not required because the target may assert a claim of abuse of process in any subsequent trial. The government cites Donaldson, supra, which, in turn, cites U.S. v. Blue, 384 U.S. 251 (1966). Blue is a criminal case. An SEC investigation may result in criminal or civil prosecution. While there may be the remedy of suppression of evidence for SEC abuse of authority in a criminal action, there clearly is no such remedy in a civil action. This Court has never

B. The Court of Appeals' Decision Is Not Contrary to Other Decisions.

The government argues that the Ninth Circuit decision conflicts with In Re Application of Cole, 237 F. Supp. 274 (S.D.N.Y. 1964), rev'd, 342 F.2d 5 (2d Cir. 1965), cert. denied, 381 U.S. 950 (1965) and Scarafiotti v. Shea, 456 F.2d 1052 (10th Cir. 1972). However, both cases are clearly distinguishable.<sup>14/</sup>

---

<sup>13/</sup> (Continued) held that evidence obtained by the government, even in violation of the Constitution, may be suppressed or excluded in civil proceedings. See U.S. v. Janis, 428 U.S. 433 (1976). Respondents are aware of no cases in which evidence obtained by abuse of process has, in fact, been suppressed.

<sup>14/</sup> The Court of Appeals' decision is not based upon constitutional provisions. It distinguishes decisions holding that there is no constitutional right to notice of third-party subpoenas. U.S. v. Schutterle, 586 F.2d 1201 (8th Cir. 1978) (due process), is thus inapplicable. Likewise, the prior Ninth Circuit decisions in Kelley v. United States, 536 F.2d 897 (1976) (Fourth and Fifth Amendments), and Howfield, Inc. v. United States, 409 F.2d 694 (1969) (unconstitutionality), are inapplicable.

In Cole, the taxpayer target sought notice of an IRS summons to a known third party, the taxpayer's bank. Because the third party was known, the target was able to force the IRS to initiate a subpoena-enforcement action, and the Second Circuit was in a position to determine that the target had no standing to intervene.<sup>11/</sup> Unsurprisingly, the Second Circuit found that the target, "at least in the factual situation presented by this case", did not need notice of a known third-party summons. 342 F.2d 7. The Second Circuit specifically declined "to discuss" whether or not this Court's Reisman decision inferred a notice requirement. 342 F.2d 7. Additionally, because the target did not question the

---

<sup>11/</sup> This Court's decision in Donaldson, supra, cited In Re Cole, supra, for the proposition that intervention in a subpoena-enforcement action is permissive and not a matter of right.

IRS's exercise of authority, the Second Circuit did not cite nor discuss this Court's decision in Powell.<sup>11/</sup>

In Scarafiotti v. Shea, the target taxpayer commenced a mandamus action against an IRS agent. The taxpayer asserted no protectable interest under Donaldson v. U.S., 400 U.S. 517 (1971), or Powell but simply demanded an order requiring the agent to give notice of its third-party interviews. The Tenth Circuit, citing In Re Cole, denied the taxpayer's request:

"Before mandamus will issue, 'it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory.'

". . . .

"Clearly, the duty here claimed is not so plainly defined 'as to be free from doubt.'"

---

<sup>11/</sup> Powell had been decided only seven weeks prior to the argument in Cole before the Second Circuit.



456 F.2d 1053, quoting from Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (10th Cir. 1966).

The Tenth Circuit did not undertake to decide the notice issue.<sup>17</sup>

In the case at hand, unlike Cole, respondents seek notice of third-party subpoenas of which they are not aware. Unlike Scarafiotti, this is not a mandamus action. Unlike Cole and Scarafiotti, respondents assert protectable interests under Powell and Donaldson; respondents claim that the Powell standards have not

---

<sup>17</sup> In a subpoena-enforcement action, the burden of showing compliance with the statutory standards of Powell is on the SEC. The SEC has possession of the evidence to make the showing. The subpoena recipient, or target, simply does not have access to such evidence in most situations. If the SEC can avoid a subpoena-enforcement action, then the target has no remedy but to bring an injunctive action. In an injunctive action the regularity of agency action is presumed, and the burden of proof is on the target. The target simply is unable to meet the burden.

been met by the SEC. Unlike Cole, respondents have not had opportunity to question the SEC's showing of lawfulness of the third-party subpoena. Unlike the Second and Tenth Circuits, which did not decide the issue, the Ninth Circuit specifically determined that a target party is entitled to notice of third-party subpoenas.<sup>11/</sup>

C. Agency Investigations Are Not Grand Jury Investigations.

The government argues that, because no statute expressly provides for notice

---

<sup>11/</sup> The SEC points to the recent decision of the Southern District of New York in PepsiCo, Inc. v. SEC, 563 F. Supp. 828 (S.D.N.Y. 1983). Unlike the case at hand, plaintiff in that case had apparently received a subpoena and was not challenging the subpoena or the purposes of the investigation. The district court denied a temporary restraining order, citing U.S. v. Miller, 425 U.S. 435 (1976), and Hannah v. Larche, supra, which the Ninth Circuit in its decision distinguished, as well as Application of Cole, supra. The district court invited a prompt appeal to the Second Circuit.



of agency subpoenas, Congress did not intend such notice to be given. The government argues that Congress intended that SEC investigations proceed, like grand jury investigations, under a cloak of secrecy. The government ignores the basic proposition that in our system of free and open government, secrecy is the rare exception, and notice is the rule. The grand jury is allowed to operate in secret only because of institutional checks and balances, and only under express provision for secrecy in Rule 6(e) of the Federal Rules of Criminal Procedure.

The government's argument is inconsistent with the reasoning of this Court in the Sells Engineering decision. Although Congress has granted the SEC the authority to make investigations, Congress has clearly not granted the SEC

the "extraordinary powers" of the grand jury; Congress has granted to the SEC "usual, more limited avenues of investigation". Sells Engineering, supra, 77 L. Ed. 2d 752, 757-58.

Although Congress has granted the SEC authority to investigate, such grant does not imply the authority to operate in secret. This Court has properly held that agency investigations, like grand jury investigations, may be initiated without probable cause. Oklahoma Press, supra; Powell, supra. However, beyond this one common element, any analogy between the grand jury and the SEC fails.

This Court has carefully refrained from suggesting that agency investigations are identical to grand jury investigations. Hannah v. Larche, 363 U.S. 420 (1960); SEC v. ESM Government Securities, Inc., 645 F.2d 310 (5th Cir.

1981)<sup>12/</sup>. The contrasts are irreconcilable:

(1) The grand jury is of constitutional origin. In contrast, the SEC is solely a creature of statute.

(2) The grand jury is a body of private citizens serving for a limited duration. In contrast, the SEC is an ongoing agency of the executive branch.

(3) The grand jury operates "independently" of the prosecutor as a check and balance upon possible prosecutorial abuse. Sells Engineering, supra, 77 L. Ed. 2d 756. In contrast, the SEC operates without this division of function. SEC v. ESM, supra, 645 F.2d 312-13. The only check and balance upon the SEC is the subpoena-enforcement action of Section

---

<sup>12/</sup> Hannah v. Larche, supra, cited extensively by the government, involved the Commission on Human Rights. That Commission was a purely investigatory agency and, unlike the SEC, had been granted no prosecutorial function.

22(b) of the Securities Act and Section 21(c) of the Exchange Act.

(4) The grand jury performs the "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions". Sells Engineering, supra, 77 L. Ed. 2d 752, quoting Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972). In contrast:

"Although the SEC has a dual function, it is not an historic guardian of individual liberties. Instead, its two functions are investigation of possible illegal activities, and adjudication of alleged violations. . . . The SEC is not, like the grand jury, a protector of individuals against government prosecution. . . . There is no division of functions . . . between police and the grand jury. . . ." SEC v. ESM, 645 F.2d 312-13, citing Hannah v. Larche, 363 U.S. at 446-47.

(5) A grand jury investigation is strictly a criminal proceeding and cannot be utilized to investigate noncriminal violations. Sells Engineering, supra.

of other agencies and will certainly affect most investigations of the SEC. The significance and wide-spread consequence of a decision of the broad question cannot be doubted. But critical aspects of the broad question have no factual foundation in the record. There are no findings of fact on the administrative burden to the SEC of giving notice, no findings on possible alternative methods of notice, and no findings on the timing or contents of notice. The record contains no foundation for the wholesale presumption of lawlessness which the SEC attributes to targets in its brief. The courts below did not meaningfully consider the remedies available to the SEC and the courts to prevent or punish obstructions of investigations. Nor did the courts make any findings whether notice would in fact delay investigations longer than the mechanics of subpoena enforcement themselves require.

In summary, the Court should not decide the question whether notice of third-party subpoena issuances is required in every SEC investigation. Amicus Wedbush believes that a realistic ability in the target to assert his interest in compliance with *Powell* requires such notice, but recognizes that the facts of this case, the lack of a conflict, and the insufficient record counsel against a decision on that question in this case.

#### CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

RONALD L. OLSON

C. DOUGLAS KRANWINKLE

DENNIS E. KINNAIRD

R. GREGORY MORGAN

MUNGER, TOLLES & RICKERSHAUSER

*Counsel for Amicus Curiae*

March 22, 1984

No. 83-751-CFX  
Status: GRANTED

Title: Securities and Exchange Commission, et al.,  
Petitioners  
V.  
Jerry T. O'Brien, Inc., et al.

Docketed:  
November 4, 1983

Court: United States Court of Appeals  
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Little, C. Dean, Symmes, William D.

Entry	Date	Note	Proceedings and Orders
1	Nov 4 1983	G	Petition for writ of certiorari filed.
2	Dec 10 1983		Brief of respondents Jerry T. O'Brien, Inc., et al. in opposition filed.
3	Dec 10 1983		Brief of respondents Harry F. Magnuson, et al. in opposition filed.
4	Dec 14 1983		DISTRIBUTED. January 6, 1984
5	Jan 9 1984		Petition GRANTED.
6	Feb 3 1984	G	***** Motion of the Solicitor General to dispense with printing the joint appendix filed.
7	Feb 21 1984		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
8	Feb 23 1984		Brief of petitioners SEC, et al. filed.
9	Feb 29 1984		Record filed.
10	Feb 29 1984		Certified original record & C.A. proceedings, 5 volumes received.
11	Feb 23 1984	G	Motion of North American Securities Administrators Association, Inc. for leave to file a brief as amicus curiae filed.
12	Mar 9 1984	D	Motion of respondents for divided argument filed.
14	Mar 19 1984		Motion of North American Securities Administrators Association, Inc. for leave to file a brief as amicus curiae GRANTED.
15	Mar 20 1984		SET FOR ARGUMENT. Tuesday, April 17, 1984. (1st case)
16	Mar 23 1984		Brief amicus curiae of Wedbush, Noble, Cooke, Inc. filed.
17	Mar 24 1984		Brief of respondents Jerry T. O'Brien, Inc., et al. filed.
18	Mar 27 1984		CIRCULATED.
19	Mar 28 1984	X	Brief of respondents Harry F. Magnuson, et al. filed.
20	Apr 2 1984		Motion of respondents for divided argument DENIED.
21	Apr 10 1984	X	Reply brief of petitioners SEC, et al. filed.
22	Apr 17 1984		ARGUED.